Supreme Court, U. S.
FILED
APR 19 1979
MICHAEL RODAK, JR., CLERK

78-1604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

CENTRAL MACHINERY COMPANY, *Appellant,*

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, *Appellee.*

On Appeal from the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

Appellant Central Machinery Company appeals from the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on December 4, 1978, rehearing denied, January 23, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 589 P.2d 426 (1978). The opinion of the Superior Court of Arizona for Maricopa County is unreported. Both opinions are reproduced in the appendix to this statement.

JURISDICTION

(i) The proceeding below was a civil action for refund of the Arizona transaction privilege tax imposed pursuant to Ariz. Rev. Stat. 42-1309, 1312, 1361.

(ii) The decision of the Arizona Supreme Court was entered on December 4, 1978. A timely motion for rehearing, as permitted by Arizona law, was denied on January 23, 1979. Appellant's notice of appeal to this Court was filed on April 18, 1979, in the Supreme Court of Arizona.

(iii) Appellant believes this Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1257(2).

(iv) The following cases sustain the jurisdiction:
United States v. *John,* 437 U.S. 634 (1978)

McClanahan v. *Arizona Tax Com'n,* 411 U.S. 164 (1973)

Warren Trading Post Co. v. *Arizona Tax Com'n.,* 380 U.S. 685 (1965)

(v) The validity of Ariz. Rev. Stat. 42-1309, 1312, 1361 as applied is involved. These sections are set out in the appendix to this statement. The federal laws involved are also set out in the appendix.

QUESTION PRESENTED

Did the State of Arizona have jurisdiction to tax the sale of farm machinery by an Arizona corporation to an Indian tribe, where the sale took place within the tribe's reservation and was approved by the Bureau of Indian Affairs Agency Superintendent?

STATEMENT OF THE CASE

The facts were stipulated below and are not in dispute. Appellant Central Machinery Company (CMC) is an Arizona corporation with headquarters at Casa Grande, Arizona. CMC is a John Deere equipment dealer.

The transaction at issue was a sale of farm machinery from CMC to Gila River Farms, a wholly-owned enterprise of the Gila River Indian Community. Gila River Farms raises crops on tribal trust land within the Gila River Indian Reservation in Arizona. CMC solicited the contract of sale within the Reservation, and the contract was made there. Delivery of the machinery and payment also took place within the Reservation. CMC's headquarters at Casa Grande are near the Reservation but outside its boundaries.

CMC did not have a permanent place of business within the Gila River Reservation, nor did it have a federal license to conduct continuous trade with Indians within the Reservation. However, the Superintendent of the Pima Agency of the Bureau of Indian Affairs approved the particular transaction at issue. See 25 U.S.C. 261-64; 25 C.F.R. part 251.

The Gila River Indian Reservation was established in 1859 for those bands of the Pima and Maricopa Tribes whose ancestral lands lay along the Gila River in the Territory of Arizona (then part of New Mexico). Act of Feb. 28, 1859, c. 66, §§ 3-5, 11 Stat. 401 (App. 2a). The tribes have occupied the same locality for many centuries, supporting their members by means of irrigated agriculture according to the Hohokam cultural tradition.[1] The United States has on numerous occasions assisted the Tribes to improve their irrigation capabilities. *E.g.,* 33 Stat. 1081, § 10 (1905).

Arizona statutes impose a "transaction privilege tax" on all sales within the State, determined as a percent-

[1] Federal and State Indian Reservations and Indian Trust Areas 51 (U.S. Dept. of Commerce 1974).

age of the gross sales price. Ariz. Rev. Stat 42-1309, 1312, 1361. If the State has jurisdiction to tax the transaction at issue here, the tax applicable is $2,916.62. CMC charged this amount to Gila River Farms, which paid it to CMC under protest. CMC paid the amount over to the State under protest and initiated the appropriate administrative proceeding under Arizona law to claim a refund. CMC agreed to pay over any amount recovered to Gila River Farms.

The administrative application was denied, and CMC brought this refund action in the Superior Court of Arizona for Maricopa County. That court held that the State had no jurisdiction to tax the transaction and ordered a refund. App. 6a. The Arizona Supreme Court reversed by a vote of four to one. App. 10a.

THE FEDERAL QUESTION IS SUBSTANTIAL AND IMPORTANT

A. The Decision Below Conflicts With Governing Decisions of This Court.

In *Warren Trading Post Co.* v. *Arizona Tax Com'n.*, 380 U.S. 685 (1965), this Court held that Arizona had no jurisdiction to impose its transaction privilege tax on sales of goods to Indians within the Navajo Reservation. As both majority and dissent below recognized, the instant case is very similar. The Arizona taxing statutes are the same (see 380 U.S. at 686 n. 1); in both cases the sellers were Arizona corporations; and in both cases the sales took place within Indian reservations. In *Warren* the buyers were Indians not specifically identified. Here the buyer is a tribal enterprise owned by the Gila River Tribes.

The court below distinguished *Warren* on three grounds. It held that the result in *Warren* depended

on the seller having (1) a permanent place of business on the reservation; and (2) a federal license authorizing continuous trade with the Indians. The court also held as a matter of law that the federal statutes governing trade with Indians did not apply. None of these reasons will withstand analysis.

The federal statutes regulating trade with Indians manifestly apply. 25 U.S.C. 261 specifies that the Commissioner of Indian Affairs has "sole power and authority to appoint traders to the Indian tribes," and 25 U.S.C. 263-64 specify that all trade within reservations is under federal authority. These laws have been interpreted broadly by this and other courts. *Warren, supra; Rockbridge* v. *Lincoln,* 449 F.2d 567 (9th Cir. 1971). There is no basis to imply the exceptions from them apparently created by the court below.

There is nothing in the laws imposing federal control over trade with Indians restricting their scope only to sellers with a permanent place of business within an Indian reservation. 25 U.S.C. 264 penalizes anyone "who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, *or* to introduce goods, or to trade therein" without a federal license (emphasis added). See part B, *infra.* One of the applicable regulations, 25 C.F.R. 251.9(b), expressly refers to "itinerant peddlers" as within the laws. See also 25 C.F.R. 252.3(i). The purported distinction also ignores history. In the early years of our Nation, persons licensed to trade with Indians brought goods to Indian country, exchanged them for furs, and left again. F. Prucha, *American Indian Policy in the Formative Years,* 1790-1834 ch. 5 (Harv. 1962).

Nor is CMC's lack of a federal license authorizing continuous trade an availing distinction. The nature of

CMC's business is such that a permanent retail establishment within the Reservation would not be practicable. The Bureau of Indian Affairs Superintendent authorized this particular sale; he licensed this single transaction rather than authorizing CMC to conduct regular business.

The BIA administrative interpretation of the proper method to license such a transaction is presumptively valid. *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 660 (1976). Also, there was no reason for the court to disapprove the pragmatic decision of the Superintendent. It is hyper-technical to suggest that a general license to sell continuously on the Reservation is necessary to come within the statutes, and licensing of a single transaction does not. It would also be ironic if the sales of retail goods in *Warren* are not taxable, but the sale of farm machinery—involving a much greater tax and relating to the basic economic purpose of the Reservation itself—can be taxed.

This Court has repeatedly held that state taxes which interfere with the purposes for which an Indian reservation was set aside are not valid. In addition to *Warren,* the Court in *United States* v. *Rickert,* 188 U.S. 432 (1903), held invalid a state personal property tax on Indian farm implements and animals located on trust allotments within a reservation. *Rickert* was relied on in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 158-59 (1973), to invalidate a state use tax imposed on goods brought onto an off-reservation tribal ski resort for incorporation into tax-exempt realty.[2] *Cf., Squire* v. *Capoeman,* 351 U.S. 1 (1956).

[2] The Court in *Mescalero* sustained a state gross receipts tax as applied to the ski resort on the ground that it was located outside the Mescalero Apache Indian Reservation.

The court below interpreted the *Warren* decision to be based solely on the court's narrow and technical reading of the federal statutes governing trade with Indians. But in *McClanahan* v. *Arizona Tax Com'n.,* 411 U.S. 164, 175, 180 (1973), this Court expressly relied on *Warren* to invalidate a personal income tax on reservation Indians—a result unrelated to the trading laws or any other specific federal regulation. That decision rather depended on the protection of tribal self-government implicit in federal establishment or recognition of a self-governing Indian reservation. It is obvious that the tax at issue here is more burdensome to the Gila River Tribes than was the tax at issue in *McClanahan* to the Navajo Tribe. This tax directly impacts on a basic function of tribal government and impairs the Tribes' efforts to be self-sufficient.

B. The Decision Below Conflicts With a Decision of the United States Court of Appeals for the Tenth Circuit.

As noted above, the court below held that the federal statutes governing trade with Indians do not apply to a seller lacking a regular place of business on the reservation and lacking a federal license permitting continuous trade with Indians. It therefore directly conflicts with the decision in *United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon,* 585 F.2d 978 (10th Cir. 1978). The court there held that an unlicensed and unauthorized sale to reservation Indians came within the statutory prohibition of 25 U.S.C. 264. There as here the sale was a single transaction by a seller without a permanent place of business on the reservation.

CONCLUSION

The decision below is clearly in conflict with this Court's holding in *Warren Trading Post Co.* v. *Arizona Tax Com'n., supra,* and it should be reversed.

Respectfully submitted,

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April 1979

APPENDIX

APPENDIX

A. State Statutes Involved

ARIZONA REVISED STATUTES [3]

§ 42-1309. Levy of tax; purposes; distribution

A. There is levied and there shall be collected by the department for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310 through 42-1315.

* * *

§ 42-1312. Tangible personal property; exceptions; classification of proceeds; sales to establishments preparing foods for human consumption

A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from:

[exceptions omitted]

* * *

---

[3] Portions of these sections not relevant to this appeal have been omitted. The sections are shown as in force at the time of the transactions at issue; there have been subsequent amendments.

§ *42-1361. Levy of tax*

A. There is levied and shall be collected by the department of revenue a tax:

1. On the privilege of doing business in this state, measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application, against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the provisions and schedules as set forth in title 42, chapter 8, article 1 [Section 42-1301 et seq.], at rates equal to fifty per cent of the rates imposed in such article.

* * *

B. Federal Statutes Involved

ACT OF FEB. 28, 1859, c. 66, 11 STAT. 388,401

* * *

SEC. 3. *And be it further enacted,* That the President of the United States be, and he hereby is, authorized and required to cause to be surveyed, and the boundaries thereof permanently marked, the tract or tracts of land lying on or near the Gila River, in the Territory of Arizona, New Mexico, now occupied by the confederated bands of Pima and Maricopa Indians, and the sum of one thousand dollars is hereby appropriated to defray the expense of the said survey.

SEC. 4. *And be it further enacted,* That the President of the United States be, and he hereby is, authorized and required to set apart the tract or tracts of land aforesaid as a reservation for the confederated bands of Pimas and Maricopas: *Provided,* That the said reservations shall not exceed one hundred square miles in extent.

SEC. 5. *And be it further enacted,* That the sum of ten thousand dollars is hereby appropriated to enable the Commissioner of Indian Affairs to make suitable presents to the

Pimas and Maricopas, in acknowledgment of their loyalty to this government and the many kindnesses heretofore rendered by them to our citizens.

UNITED STATES CODE TITLE 25

§ *261. Power to appoint traders with Indians*

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

§ *262. Persons permitted to trade with Indians*

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ *263. Prohibition of trade by President*

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licensees to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ *264. Trading without license; white persons as clerks*

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any

Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

C. Opinions Below

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. C 297870

CENTRAL MACHINERY COMPANY, *Plaintiff*,

v.

STATE OF ARIZONA, STATE TAX COMMISSION OF ARIZONA,
Defendants.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

This cause having been heard by the Court on a stipulation of facts, and the Court having considered the second agreed statement of facts, and the arguments and memoranda of counsel,

IT IS ORDERED finding in favor of Plaintiff and against the Defendant.

The stipulated facts disclose that Plaintiff is not a licensed Indian trader and has no office or premises on the Gila Indian Reservation. The sale in question involving

certain tractors was made by Plaintiff to a Gila River Indian agency F.O.B. on the Reservation and pursuant to negotiations conducted on the Reservation.

Plaintiff collected from the Indian purchaser of the tractors the amount of Arizona's transaction privilege tax and has agreed to refund the amount of the tax to the Indian purchaser if this suit by Plaintiff is successful.

Congress has pre-empted the area of Indian commerce by enactment of Title 25, U.S. Code, and the accompanying regulations in 25 Code of Federal Regulations. *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965). Certain state laws have been permitted to apply to activities on Indian Reservations where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations. *Warren Trading Post* v. *Arizona Tax Commission,* supra.

The *Warren Trading Post* case held that the assessment and collection of the Arizona transaction privilege tax on sales made on the Reservation by a licensed Indian trader would frustrate the Congressional purpose of assuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations. The Court stated at 380 U.S., p. 690, 85 S.Ct., p. 1245 that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." See also *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, S. Ct. 1257, 36 L.Ed. 2d 129 (1973).

25 U.S.C. § 261 provides that "The Commissioner of the Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quality of goods and the prices at which such goods shall be sold to the Indians."

25 C.F.R. § 251.9(b) provides for the method of application for license as an Indian trader and provides the method for licensing both permanent traders with premises on the reservation and for itinerant traders for occasional sales.

The stipulated facts do not specify the reasons why Plaintiff did not possess a license as an itinerant trader at the time of the sale in question. The Defendant Department of Revenue argues that the *Warren Trading Post* case should not apply to the extent that Plaintiff or the Bureau of Indian Affairs has failed to comply with the licensing requirements. However, the Supreme Court holding in *Warren Trading Post* rests on the all-inclusive federal regulatory scheme. Nowhere do the federal statutes and regulations indicate that non-compliance by a trader or the Bureau of Indian Affairs will allow imposition of state laws which would otherwise be inapplicable. It is the *existence* of the federal laws and accompanying regulations and not their *enforcement* which pre-empts the State's ability to tax the transaction in question.

Accordingly, IT IS ORDERED finding in favor of Plaintiff and against the Defendant in the amount of $2,916.62, plus costs and interest on said sums at the legal rate from date of judgment until paid.

ENTERED this 31st day of August, 1976.

/s/ Sandra D. O'Connor
JUDGE SANDRA D. O'CONNOR

589 Pacific Reporter, 2d Series

STATE OF ARIZONA, STATE TAX COMMISSION OF ARIZONA,
Appellant,

v.

CENTRAL MACHINERY COMPANY, an Arizona Corporation,
Appellee.

No. 13593.

Supreme Court of Arizona,
In Banc.

Dec. 4, 1978.

Rehearing Denied Jan. 23, 1979.

STRUCKMEYER, Vice Chief Justice.

This appeal rises out of an action brought by the Central Machinery Company for a refund of sales taxes in the amount of $2,916.62, paid under protest. The Superior Court of Maricopa County entered judgment in favor of Central Machinery, and this appeal followed. Judgment reversed.

The parties in their second agreed statement stipulated to these facts: Central Machinery is an Arizona corporation and maintains an office in Casa Grande, Arizona, which is not on an Indian reservation. In 1973, agents of Central Machinery went onto the nearby Gila River Indian Reservation to solicit the sale of farm machinery from the Gila River Farms, an enterprise of the Gila River Indian Community. The Gila River Indian Community is an Indian Entity existing under the authority of 48 Stat. 984, 25 U.S.C. 461, et seq. After a period of negotiation, Gila River Farms executed a purchase order for eleven John Deere tractors at a total price of $100,137.26. An item of $2,916.62, Arizona's Transaction Privilege Tax, was included in the total purchase price. Delivery of the tractors was made

by the John Deere Company to Central Machinery in Casa Grande, Arizona. Central Machinery, after servicing the tractors, delivered them to the Gila River Farms on the Indian reservation at Sacaton, Arizona. Central Machinery did not possess a federal license to trade on any Indian reservation and, although it could have been excluded from the solicitation of business on the reservation by the Superintendent of the Pima Indian Agency, the Bureau of Indian Affairs gave permission to Central Machinery to sell the tractors to the Gila River Farms. The purchase order provides for delivery of the tractors F.O.B. Sacaton. Payment to Central Machinery was by check delivered on the Gila River Indian Reservation. Central Machinery, if it recovers in this action, will remit the amount of the recovery to Gila River Farms.

In the court below, on summary motion, a judgment in favor of Central Machinery was entered. The trial court felt, and so stated that the decision in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed2d 165 (1965), prohibited this tax. But we do not think so.

In *Warren*, Arizona attempted to levy a tax upon the gross proceeds of sales of the Warren Trading Post Company. The company did a retail trading business with Indians on the Navajo Indian Reservation under a license granted by the United States Commissioner of Indian Affairs pursuant to 19 Stat. 200, 25 U.S.C. § 261 (1958 ed.). The United States Supreme Court decision pointed out that the federal government had comprehensively regulated Indian traders and that existing statutes made specific restrictions on trade with the Indians. Under authority of Congress's Acts, the Commissioner of Indian Affairs had promulgated detailed regulations "prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; * * * conditions under which government employees may trade with Indians; articles that cannot be

sold to Indians; and conduct forbidden on a licensed trader's premises." The opinion concluded:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."

The Court also said:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon *Indian traders* for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." (Emphasis added.)

It is clear that *Warren* was decided on the theory of federal preemption. It is also clear that by the use of the words "Indian traders" the Court meant a defined group of persons licensed under authority of the United States states statutes to carry on the business of trading on Indian reservations with Indians.

This case is clearly distinguishable. Central Machinery is not an "Indian trader", although it may on occasions do business with reservation Indians, even to the extent of going on the reservation to solicit business. Since Central Machinery is not an Indian trader within the meaning of *Warren* and since this transaction has not run afoul of any congressional enactments passed to protect and guard its Indian wards, we do not find a federal preemption which would forbid the imposition of this tax.

The foregoing it sufficient to settle the dispute in this case. However, Central Machinery seems to be asserting

that because the economic burden of the tax falls upon the Indians, it is somehow immune from the imposition of the tax. As to this, it has been repeatedly held that where the economic burden falls is not the controlling factor. *Fort Mohave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976); *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972), *rehearing denied* 405 U.S. 1033, 92 S.Ct. 1280, 31 L.Ed.2d 491 (1972), *motion for leave to file second petition for rehearing denied*, 409 U.S. 901, 93 S.Ct. 94, 34 L.Ed.2d 163 (1972); *G. M. Shupe, Inc.* v. *Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (1976).

The factors controlling the imposition of a state tax have recently been set forth in *Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976):

> "We see nothing in this burden which frustrates tribal self-government, see *Williams* v. *Lee*, 358 U.S. 217, 219-220, 79 S.Ct. 268, 270, 3 L.Ed.2d 251, 253 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States* v. *McGowan*, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L. Ed. 410, 413 (1938). 'Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.'" *Id.* at 483, 96 S.Ct. at 1646.

No claim is made that Arizona's tax conflicts with any enactment of the federal government passed to protect and guard its Indian wards.

Judgment of the Superior Court reversed.

CAMERON, C. J., and HAYS and HOLOHAN, JJ., concurring.

GORDON, *Justice* (dissenting):

I must dissent from the majority opinion, because it distinguishes *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed2d 165 (1965) from the facts of this case. I believe that *Warren, supra,* controls and prohibits the imposition of the tax in question.

In both *Warren, supra,* and in this case, the vendors are non-Indians making sales to Indians on reservation land. The tax in dispute in both cases is the same, and in both, although the non-Indian seller is legally required to pay the tax, the economic impact is borne by the Indian buyer. The tax was invalidated in *Warren* but is upheld here. Only two meaningful differences exist between the cases: Central Machinery did not maintain a permanent place of business on the reservation and did not possess a trader's license. Neither of these differences merits the outcome of the majority opinion.

CENTRAL MACHINERY'S LACK OF A PERMANENT PLACE OF BUSINESS

Volume 25 C.F.R. § 251.9(b) provides for the licensing of "[i]tinerant peddlers * * as traders." Peddler is defined in 25 C.F.R. § 252.3(i) as "a person who offers goods for sale within the exterior boundaries of the Hopi, Navajo or Zuni Reservations, but does not do business from a fixed location or site on any of those reservations." Section 252 deals with business practices on the Navajo, Hopi, and Zuni reservations and, therefore, is not binding on this case. Its definitional section, however, can reasonably be consulted to construe § 251, which it without such a definitional aid. It would be illogical to believe that the term "peddler" in each of these parts refers to different types of people. The obvious purpose of sections 251 and 252 is to protect the reservation Indians from unscrupulous vendors, whether they be based on the reservation or off. Central Machinery's lack of a permanent place of business on the reservation is not fatal, therefore, to its claim that

it should be granted the tax preference extended to Indian traders. A peddler can be licensed as a trader. This issue was raised and briefed by the parties, but is not discussed in the majority opinion.

Central Machinery's Lack of a Trader's License

Central Machinery sold tractors to Gila River Farms without first being licensed pursuant to 25 C.F.R. § 251.9 (b), which requires that such a license or permit be obtained from the Superintendent of the Pima Agency, the Bureau of Indian Affairs agency supervising the reservation. Approval, therefore, was obtained from the very person authorized to grant a license.

It is unclear from the record why a license or permit was not obtained. To penalize the Indian purchaser because the specific licensing procedure was not followed is illogical in light of the Bureau of Indian Affairs' knowledge and approval of the transaction. The license requirement is for the protection of Indians. *Warren, supra.* Sanctions for violation of the licensing regulations include forfeiture of all merchandise offered for sale and a fine of $500.00. 25 C.F.R. § 251.3. The penalty is to punish the trader, not the Indian. If Central Machinery's failure to have a license were to remove this case from the protection of *Warren,* the result would compel the Indians to pay economic sanctions to Arizona because of the Bureau of Indian Affairs' failure to enforce its regulations. As the trial court's opinion stated, "Nowhere do the federal statutes and regulations indicate that non-compliance by a trader or the Bureau of Indian Affairs will allow imposition of state laws which would otherwise be inapplicable. It is the existence of the federal laws and accompanying regulations and not their enforcement which preempts the State's ability to tax the transaction in question."

Economic Impact

The majority opinion concludes that the tax in question is not barred, because it is imposed on the seller, Central Machinery, and not on the Indian buyer. *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968), however, held that in questions of immunity, the Supreme Court is not bound by a state court's characterization of a tax. There a state sales tax was levied against the seller but passed on to the purchaser. The purchaser was a federal bank, and, like the Gila Indians, was immune from tax. The Supreme Court ignored the state's contention that the tax was not on the bank and found it impermissible. In *Warren, supra,* the Supreme Court has already addressed the status of the tax in question and held it to be impermissible when levied against Indian traders.

Furthermore, I believe the facts in this case show that the financial impact of Arizona's tax falls directly on the Indians as passed on by the vendor and that the cases dealing with taxation of Indians *do* focus on economic impact. This in fact appears to be the decisive factor in determining if a tax will be upheld, In *G. M. Shupe, Inc.* v. *Bureau of Revenue,* 89 N.M. 265, 550, P.2d 277 (1976), a corporation constructing a dam on reservation land for the Department of the Interior was not exempt from state tax. The activity was merely on Indian lands, and the tribe would suffer no direct effect because of the tax. In *Fort Mohave Tribe* v. *County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), non-Indians leasing Indian land had to pay a tax on the land. Although this might have had an indirect effect on the Indians' bargaining power, the direct result was to give the non-Indian leasee a more attractive investment. In *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) an Indian selling cigarettes on the reservation was required to pay a sales tax on cigarettes sold to non-Indians,

but not on cigarettes sold to other Indians. Although the Indian vendor argued that he would suffer an out-of-pocket loss, the only certainty was that the non-Indian buyer would benefit. The effect on the Indian seller was too indirect.

In none of the cases in which a tax is upheld is an Indian the consumer who is directly hit. The direct impact is on the non-Indian, and the effect on the Indian is to some degree speculative. In *Warren, supra,* and in this case, it is the Indian consumer who must directly bear the burden. The subsequent case law is not on inroad on *Warren,* which still controls this issue and renders the tax imposed on Central Machinery illegal.

I must, therefore, respectfully dissent.

D. Denial of Rehearing

(Same Caption as Above)

The following action was taken by the Supreme Court of the State of Arizona on January 23, 1979 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing—DENIED."

Justice Frank X. Gordon, Jr. voted to grant.

Mandate enclosed herewith.

CLIFFORD H. WARD, *Clerk*
By /s/ DIANA K. BENTLEY, *Deputy Clerk*

E. Notice of Appeal (Filed April 18, 1979)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 13593

STATE OF ARIZONA, STATE TAX COMMISSION OF ARIZONA,
Appellant,

v.

CENTRAL MACHINERY COMPANY, an Arizona corporation,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Central Machinery Corp., plaintiff-appellee above named, hereby appeals to the Supreme Court of the United States from the judgment and opinion of this Court entered on December 4, 1978, and the denial of rehearing on January 23, 1979.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Respectfully submitted,

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Attorneys for Central Machinery Company

Supreme Court, U. S.
FILED
SEP 1 1979
MICHAEL RODAK, JR., CLERK

No. 78-1604

In the Supreme Court of the United States

OCTOBER TERM, 1978

CENTRAL MACHINERY COMPANY, APPELLANT

v.

ARIZONA STATE TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1604

CENTRAL MACHINERY COMPANY, APPELLANT

v.

ARIZONA STATE TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation dated June 11, 1979.

In the present case, an agricultural equipment dealer challenged the validity of Arizona's "transaction privilege tax" as applied to a sale of farm machinery to the Gila River Indian Community, for use on the Tribe's Reservation. Reversing the State Superior Court, the Arizona Supreme Court, by a divided vote, rejected the claim. The dealer has appealed here and the jurisdiction of this Court seems clear under 28 U.S.C. 1257(2). See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685, 686 (1965).

In our view, the federal question presented is substantial. Directly at issue is whether this Court's decision in

Warren Trading Post, *supra*, was correctly distinguished on the ground that the present dealer is not licensed as a permanent "Indian trader" and does not reside on the Reservation. In another aspect, the case presents the recurring question whether transactions between Indians and non-Indians within a Reservation may be taxed by the State so long as the legal incidence of the tax falls on the non-Indian, notwithstanding the economic consequence may be to frustrate, or substantially to diminish the prospect of achieving, the goal of tribal self-sufficiency. Here, that issue has special significance because the tax imposed relates to the purchase of farm machinery which is today essential to the development of the Reservation in accordance with the original intent to make farmers of the Indians, sustaining themselves by the cultivation of the lands set aside for their use.

We note, finally, that the present case, together with others presently scheduled for argument[1] or pending on petitions for certiorari,[2] affords the Court an opportunity definitively to fix the boundary between State and tribal regulatory and taxing authority within Indian Reservations. In the circumstances, we urge the Court to note

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[1] *State of Washington* v. *Confederated Tribes of the Colville Reservation, et al.*, No. 78-630.

[2] *White Mountain Apache Tribe, et al.* v. *Blacker, et al.*, No. 78-1177; *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians*, No. 78-1653. In both these cases, responding to the Court's invitation, we have urged that certiorari be granted.

probable jurisdiction of this appeal and, if certiorari is granted in Nos. 78-1177 and 78-1653 (note 2, *supra*), to set the several cases for argument in sequence.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

A MOTION TO DISPENSE
WITH THE PRINTING
OF THE APPENDIX WAS
MADE AND GRANTED.
IT THEREFORE DOES
NOT APPEAR IN THIS
CASE.

Supreme Court, U.S.
FILED
MAY 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1604

CENTRAL MACHINERY COMPANY, APPELLANT

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1604

CENTRAL MACHINERY COMPANY, APPELLANT

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS

I.

INTRODUCTION

At the outset, the appellee, State of Arizona, State Tax Commission of Arizona, (hereinafter "Arizona") wishes to point out several portions of appellant's Jurisdictional Statement with which it disagrees. In this regard, Central Machinery Company

(hereinafter "CMC") characterizes its "Question Presented" as being whether or not the State of Arizona has jurisdiction to tax "...the sale of farm machinery by an Arizona corporation to an Indian tribe ...". In order to avoid any misinterpretation of this language, Arizona wishes to point out that the taxable event under the transaction privilege tax code provisions here in question (i.e., A.R.S. §§ 42-1309, 42-1312, 42-1361) is not the actual sale of tangible personal property. Rather, the taxable event is the exercise of the privilege of engaging in business within the State of Arizona, the gross receipts from the sale transaction constituting only the measure of the magnitude of the business activity. Tower Plaza Investments, Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973), appeal dismissed, 414 U.S. 1118 (1974).

Similarly, Arizona disagrees with

CMC's characterization in its "Statement of the Case" of the transaction at issue being a "...sale of farm machinery from CMC to Gila River Farms...." Again, the Arizona transaction privilege tax is not imposed upon sales transactions themselves, but rather is imposed upon the privilege of engaging in business within the State of Arizona. Accordingly, the Arizona transaction privilege tax is not to be equated with a "sales" tax insofar as such comparison attempts to establish that the actual taxable event is the sale transaction itself rather than the exercise of the privilege of engaging in business. This distinction is germane herein with respect to any conclusions to be drawn relating to the person or entity bearing the legal incidence of the tax.

The Supreme Court of Arizona has consistently held, in interpreting the operation of the transaction privilege tax,

that the legal incidence of the tax falls upon the person or entity engaged in business within Arizona and does not fall upon such entity's customers. Tower Plaza Investments, Ltd. v. DeWitt; supra, Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1955). This determination should be deemed conclusive. American Oil Co. v. Neill, 380 U.S. 451 (1965). Moreover, there is no provision of Arizona law which mandates that either the legal incidence or the economic burden of the tax be "shifted" or "passed on" from the business entity to its customers, any "shifting" of the economic burden occurring solely by grace of statutory silence and contractual negotiation between the business and the customer. Arizona State Tax Commission v. Garrett Corporation, supra.

Finally, Arizona would point out that CMC's Statement of the Case includes several references to factual matters which

were contained in a stipulated statement of facts filed at the trial court level. Among the facts asserted by CMC in its statement of the case is that Gila River Farms raises crops on tribal trust land within the Gila River Indian Reservation in Arizona. The appellee has no way of confirming this assertion since it was not included in the original statement of facts filed in the court below. Furthermore, CMC's Statement of the Case includes references to the history and establishment of the Gila River Indian Reservation which were not a part of the stipulated facts in the court below. Such facts were neither raised nor urged in the court below. While these matters may raise mixed questions of fact and law, and thus properly before this Court, it is simply the appellee's objective to point out that the Jurisdictional Statement constitutes the first document in this controversy wherein such

matters have been set forth.

In this regard, Arizona would further point out that several facts which were included in the stipulated statement of facts filed in the lower court have been omitted from those facts to which CMC refers in its Statement of the Case, including the following:

1. Initial delivery of the tractors was made from John Deere Company to CMC's plant in Casa Grande early in 1974 where the tractors were made "dealer-ready" (i.e., adjusted, lubricated, etc.) by CMC;

2. Thereafter, the tractors were delivered to Gila River Farms at Sacaton, Arizona on the Gila River Indian Reservation;

3. CMC, as a corporation engaged in business for profit, "passed on" the economic burden of both the transaction privilege tax liability related to the transaction in question as well as the economic burdens of

its other taxes and costs, such latter burdens being included as undifferentiated cost components in the purchase price.

II.

THE FEDERAL QUESTION PURPORTEDLY RAISED IS NOT SUBSTANTIAL.

A. The decision below does not conflict with the decisions of this Court.

The thrust of CMC's argument is that this Court's decision in Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685 (1965) (hereinafter "Warren") controls and that the Arizona Supreme Court's decision herein conflicts with the rationale of that case. For the following reasons, Arizona disagrees.

To begin with, the Warren Trading Post Company was a federally-licensed Indian trader in presumptive compliance with the full spectrum of federal laws and regulations governing the business of Indian trading on Indian reservations. In

addition, as footnote 1 in Warren, (380 U.S. at 686) and the breifs therein reveal, the licensed Indian trader made no challenge to the right of Arizona to impose the transaction privilege tax directly upon it with respect to its sales to non-Indians on the reservation. Moreover, although the Warren Trading Post Company argued both that the tax in question was preempted by federal law as well as that it constituted an interference with Indian Commerce, (see, 14 L.Ed.2d at 812-313), this Court based its ruling upon the preemption issue and did not reach the Commerce Clause question. (See, 380 U.S. at 686.)

Accordingly, it is the position of Arizona herein that the holding articulated in Warren is bottomed upon the fact that because the Warren Trading Post Company was engaged in the business of Indian trading upon an Indian reservation and was therefore subject to and in compliance

with the full range of federal laws and regulations established by Congress to govern such reservation mercantile Indian trade business, the State taxes in question were preempted. Indeed, this Court specifically stated that the apparently all-inclusive regulations and statutes authorizing them established that Congress had "...taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders." (Emphasis added.) 380 U.S. at 390. In reaching this conclusion, this Court pointed out (380 U.S. at 690, n. 14) that the federal statutes and regulations applied only to activities on reservations, citing Taylor v. United States, 44 F.2d 531 (9th Cir. (1930), cert. denied, 283 U.S. 820 (1931) and an opinion of the Solicitor's Office of the Department of the Interior, 57 I.D. 124 at 125.

This Court also relied upon another Solicitor's Opinion, 58 I.D. 562 which, as did the prior Solicitor's Opinion, interpreted the federal statutes to bar states from taxing "...federally-licensed Indian traders on their sales to reservation Indians on a reservation." (380 U.S. at 690).

It is Arizona's position herein that an examination of this Court's holding above-quoted along with the authorities upon which the holding was based establishes that the area being preempted is that of the business of Indian trading on an Indian reservation. If an entity is not engaged in the business of Indian trading upon an Indian reservation or if the taxable activity which purportedly triggers the application of the state tax does not occur upon an Indian reservation, it is Arizona's position that no preemption occurs and that state laws of general

application, including tax laws, remain in effect with respect to a person or entity engaged in business within the state.

It at once becomes apparent that CMC does not "fit the mold" created under Warren. It is the business of Indian trading on an Indian reservation that has been preempted, not sales to reservation Indians by off-reservation retailers not engaged in the business of Indian trading. Indeed, Solicitor's Opinion 57 I.D. 124, supra, specifically opines, 57 I.D. at 126, that where traders are not located on Indian reservations they are responsible for the state taxes in question and are subject to state licensure whether or not they are Indians and whether or not they deal with Indians, save with regard to special types of Indian purchases purportedly made as instrumentalities of the federal government used to improve the economic conditions of the Indians.

Moreover, Solicitor's Opinion 58-562, supra, further narrows the limited exception set forth in 57 I.D. 124 at 126, supra. Specifically, after examining this Court's decisions in, among others, Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943), Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943) and State of Alabama v. King & Boozer, 314 U.S. 1 (1941), Solicitor's Opinion 58 I.D. 562, 567 held, inter alia:

> "That part of the opinion of May 8, 1940 [i.e., 57 I.D. 124, supra] which held that purchases made by an Indian or by Government agents for an Indian with restricted funds outside of an Indian reservation were exempt from the payment of State sales taxes is overruled, and the superintendents should be instructed that merchandise obtained on purchase orders issued to merchants doing business outside of the reservation and paid for with restricted funds is subject to state sales taxes unless Congress has provided that the funds used are tax exempt." (Emphasis added.)

In the instant case, it is manifestly apparent that CMC is not located on the Gila River Indian Reservation, but is a merchant doing business outside of the Reservation rather than upon the Reservation as a federally-licensed Indian trader. CMC's assertion (Jurisdictional Statement, p. 6) that the Bureau of Indian Affairs Superintendent "...licensed this single transaction rather than authorizing CMC to conduct regular business..." is somewhat inaccurate. The only thing that the Superintendent did, as noted in the stipulation of facts, was approve the purchase order for the tractors. The record herein is singularly barren of any indication that a federal Indian trader's license under 25 U.S.C. §§ 261, et seq. or an itinerant peddler's license under 25 C.F.R. § 251.9(b) was either applied for or issued or, in fact, that CMC was even entitled to acquire one.

Again, the taxable event under the Arizona transaction privilege tax code is the exercise of the privilege of engaging in business and not the sales transaction itself. The fact that the tractors were delivered on the Indian reservation does not alter the fact that the purchase order covering the transaction was issued not to a federally-licensed Indian trader doing business within the exterior boundaries of the reservation, but rather, was issued to a non-Indian Arizona corporation engaged in the business of selling tangible personal property at retail within the geographic and jurisdictional boundaries of the State of Arizona within the City of Casa Grande, Arizona, a site not located within the exterior boundaries of any Indian reservation at all.

Under these circumstances, the distinction between Warren and the instant matter is sharpened. Insofar as

CMC is concerned, both the taxable event (engaging in business) as well as the sale transaction by which the taxable event was measured occurred within the political and geographic boundaries of the State of Arizona. Surplus Trading Company v. Cook, 281 U.S. 647 (1930). Since the only taxable event with which the Arizona transaction privilege tax is concerned herein occurred both within the State of Arizona and beyond the boundaries of any Indian reservation, the application of the tax to CMC, as a merchant not located upon any Indian reservation and not licensed as either a federal Indian trader or itinerant peddler, is not only not in conflict with the rationale of Warren, but rather is in conformity with subsequent decisions of this Court in this regard. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-483 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 153

(1973); cf. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962).

It would be anomalous indeed to hold that a retailer such as CMC, who maintians no place of business on an Indian reservation (unlike Warren Trading Post Company), who has obtained neither an itinerant peddler's license nor a federal Indian trader's license (unlike Warren Trading Post Company), who maintains a permanent place of business within Arizona off of any reservation (unlike Warren Trading Post Company), who is entitled to and enjoys the full range of state police, fire, sanitation and similar services (unlike Warren Trading Post Company) and who is unquestionably engaged in the business of selling tangible personal property within the jurisdiction of Arizona beyond the exterior boundaries of any Indian reservation (unlike Warren Trading Post Company) should be entitled to the same

tax exemption benefits available to a reservation mercantile trade operation in full compliance with the preemptive federal statutes and regulations (like Warren Trading Post Company).

In this regard, the decision in the Moe case, supra, strongly supports the dismissal of the instant appeal. As the Supreme Court of Arizona noted in its opinion, 589 P.2d 426 at 428, the factors controlling the imposition of a state tax have by this Court been set forth in the Moe decision, supra. In that case, this Court held, inter alia, that where the legal incidence of a state tax fell upon a non-Indian purchasing cigarettes from an Indian vendor upon an Indian reservation, the fact that certain detrimental economic burdens associated with the collection of such tax would be borne by a reservation Indian were not impermissible in spite of the fact that such detrimental

economic burdens were the result of a tax "precollection" provision mandated by Montana state law. See, 425 U.S. at 481-483. In so holding, this Court pointed out that its decision in Warren involved the Arizona transaction privilege tax as applied to business activities occurring completely within the exterior boundaries of the Indian reservation in question.

The Arizona Supreme Court further relied upon this Court's language in the Moe case, supra, 425 U.S. at 483, to the effect that the economic burdens associated with the precollection of the Montana tax by the Indian vendor and borne by the Indian vendor did not frustrate tribal self-government under Williams v. Lee, 358 U.S. 217, 219-220 (1959) or run afoul of any congressional enactment dealing with the affairs of reservation Indians under United States v. McGowan, 302 U.S. 535, 539 (1938).

As stated by this Court in United States v. McGowan, supra, 302 U.S. at 539, and reiterated by this Court in the Moe decision, supra, 425 U.S. at 483:

> "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments."

If the State of Arizona were attempting herein to tax the actual sale transaction which transpired upon the Gila River Indian Reservation, CMC's argument would have more appeal. However, as previously noted, Arizona seeks to tax only the exercise by CMC within the State of Arizona at Casa Grande, Arizona of the privilege of engaging in business.

The dispute is thus brought full circle back to the initial position urged by Arizona herein, that is, that Warren establishes that the preeempted area is that of the business of Indian trading on an Indian reservation and not the total area of

Indian Commerce between reservation Indians or reservation Indian entities and merchants other than licensed Indian traders engaged in business beyond the boundaries of any Indian reservation.

In this regard, CMC's argument (Jurisdictional Statement, p. 5) that the Arizona Supreme Court ruling was that the federal statutes governing trade with Indians did not apply to it is somewhat inaccurate. The Arizona Supreme Court held that since CMC was not a licensed Indian trader within the purview of Warren, the tax herein was not preempted, because CMC was not an Indian trader. Clearly, although it was not urged in the lower court, CMC , as any other person not possessed of a federal Indian trader's license or an itinerant peddler's license, would be subject to the sanctions of forfeiture of goods and fine for introducing goods for sale into the reservation with-

out required licenses and without having complied with the detailed regulations prescribing in the most minute fashion who shall be licensed, how the trade shall be conducted, what prices shall be charged, etc., established under federal law.

Thus, CMC's reliance upon Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976) is misplaced. It is one thing to argue that an administrative interpretation of a statute, while not conclusive, is entitled to great respect, the point made in the Hollowbreast case, supra. It is quite another thing, however, to argue that, in the face of apparently all-inclusive mandatory statutes and regulations governing the business of Indian trading on reservations, the requirements of such provisions may go virtually ignored while the benefits otherwise flowing from compliance therewith may be enjoyed. Quite simply, CMC, not being engaged in the business

of Indian trading on an Indian reservation within the meaning of Warren, is not entitled to the asserted exemption from taxation herein on the purported basis that the entire area of commerce with Indians has been preempted.

Indeed, the fact that CMC may not have had a federal Indian trader's license or an itinerant peddler's permit may be nothing more than a manifestation of its nonentitlement thereto. Such an interpretation is not only reasonable, but is consistent with the holding in Solicitor's Opinion 58 I.D. 562 to the effect that the superintendents of the various reservation agencies overseeing purchases of goods by reservation Indians were to be instructed that merchandise obtained on purchase orders issued to merchants doing business outside of the reservation and paid for even with restricted funds were subject to state sales taxes unless Congress had

specifically provided that the funds used were tax-exempt. The record herein is devoid of any indication that Congress specified that the funds used to purchase the eleven tractors in question were to be tax-exempt. On the contrary, the fact that the Superintendent of the Pima Agency approved the purchase order, which purchase order included the economic burden of the transaction privilege tax imposed upon CMC, further buttresses the conclusion that CMC was not and is not engaged in the business of Indian trading within the exterior boundaries of any Indian reservation and that the transaction was properly included in the measure of CMC's business activity.

Accordingly, Central Machinery Company's reliance upon United States v. Rickert, 188 U.S. 432 (1903), Mescalero Apache Tribe v. Jones, supra, and McClanahan v. Arizona Tax Commission, 411 U.S. 164

(1973) (hereinafter "McClanahan") is inapposite. Each of the aforesaid cases involved fact situations distinguishable from the present one in that the state taxes in question were being imposed directly upon reservation Indians or reservation Indian property. Such an attempt to impose the direct legal incidence of a state tax upon such a person or property is impermissible under those decisions, but the circumstance is without relevance to the present dispute. The fact of the matter is that, in situations not involving preempted areas such as that of engaging in the business of Indian trading on an Indian reservation, the fact that the economic burdens of state taxes may, in some form or another, be borne by reservation Indians or Indian entities does not, for that reason, invalidate the tax. Moe v. Confederated Salish and Kootenai Tribes, supra; Fort Mojave Tribe v. County of San

Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied 430 U.S. 983 (1977); Kahn v. Arizona State Tax Commission, 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed, 411 U.S. 941 (1973);[1] cf. Tonasket v. State of Washington, 84 Wash.2d 164, 525 P.2d 744 (1974), appeal dismissed 420 U.S. 915 (1975); Makah Indian Tribe v. Tax Commission of Washington, 72 Wash.2d 613, 434 P.2d 580, appeal dismissed 393 U.S. 8 (1968).

CMC's reliance upon and analysis of McClanahan misapplies the holding in that case and attempts to expand the reach of Warren in derrogation of this Court's ruling in the Moe case, supra. The fact that this Court cited its prior decision

1. The appeal was dismissed for want of a substantial federal question one month after the decision in McClanahan v. Arizona Tax Commission, supra. In view of the dissent to the dismissal (authored by Justice Douglas and joined in by Justice Brennan), Arizona would submit herein that the dismissal should be treated as a binding adjudication on the merits entitled to precedential weight. State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, ___ U.S. ___, 99 S.Ct. 740, 749-750 n. 20 (1979); Hicks v. Miranda, 422 U.S. 332, 343-345 (1975).

in Warren in reaching its decision in McClanahan does not permit CMC to argue, therefore, that the rationale of Warren should be applied to void the imposition of a tax upon an off-reservation non-Indian retail merchant who himself -- rather than his customers (whether they be Indian or non-Indian) -- bears the legal incidence of the state tax in question.

CMC's assertion (Jurisdictional Statement, p. 7) that it is obvious that the tax herein is more burdensome to the Gila River Tribes than was the tax at issue in McClanahan to the Navajo Tribe, is not only unsupported by the record, it is inaccurate as well when one recalls that Rosalyn McClanahan brought her action not only in her own behalf but upon behalf of all those similarly situated, the traditional requirement of a class action.

The fact remains that in the present case, beyond the circumstance that the

legal incidence of the tax falls upon a non-Indian merchant doing business not within the exterior boundaries of an Indian reservation rather than upon an Indian living upon and earning all of his or her income from sources within the Indian reservation, the Gila River Farms, as vendee, bore nothing more than a collection of various categories of costs passed on to it by CMC as part of the overall contract price. In addition to the contractually "passed on" economic burden of CMC's transaction privilege tax, Gila River Farms also bore and paid for, without protest and with the approval of the Superintendent of the Pima Agency, the economic burdens of CMC's other taxes and costs which were included as undifferentiated components within the purchase price of the tractors. This circumstance clearly distinguishes the factual framework of the present case from the facts in the McClanahan,

Rickert and Mescalero Apache Tribe cases, supra.

In short, the federal question herein which CMC contends is substantial and important is, in fact, not present. The holdings in the Warren Trading Post and Moe decisions, supra, as well as the Opinions of the Solicitor's Office cited and relied upon in Warren clearly establish that CMC is not engaged in the business of Indian trading upon an Indian reservation, and, accordingly, should not be treated as a "licensed Indian trader" entitled to the benefits, but not subject to the responsibilities, associated therewith.

B. The decision below does not conflict with United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978 (10th Cir. 1978).

CMC also argues that the Arizona Supreme Court's opinion herein conflicts with the decision in United States ex rel.

Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978 (10th Cir. 1978). The State of Arizona disagrees.

The Hornell case, supra, held that the provisions of 25 U.S.C. § 264 applied to a New Mexico auto dealership ("Navajo Motors") to authorize a $500 fine against it for selling a car to a Navajo Indian husband and wife on the Navajo Reservation, but without a federal Indian trader's license. Although the United States and the husband and wife also sought forfeiture of the car, as authorized by 25 U.S.C. § 264, the court rejected this part of the claim.

There is nothing inconsistent between the result in the Hornell case, supra, and the Arizona Supreme Court's decision herein. 25 U.S.C. § 264 prohibits any person other than an Indian of the whole blood (unless dealing with the Chotaws, Cherokees, Chickasaws, Creeks or Seminoles) to trade within or introduce goods into an Indian

reservation without the federal trader's license authorized under 25 U.S.C. § 261. There is nothing in the Arizona Supreme Court's opinion herein that would prohibit the initiation of a qui tam or forfeiture action against CMC: CMC, as did Navajo Motors, introduced goods into an Indian reservation without the required federal trader's license, an act that "...falls squarely within the scope of commercial activities proscribed by the statute." See 585 F.2d at 980.

This does not mean, however, that Navajo Motors was engaged in the business of Indian trading on an Indian reservation as was the Warren Trading Post Company. All that it means is that Navajo Motors violated the federal law by selling the car without the required license, a result that would obtain with respect to anyone else who did the same thing. The obvious purpose of 25 U.S.C. § 264 is to discourage

unlicensed persons from selling goods to reservation Indians except in strict conformity with federal laws and regulations governing the prices, quality, etc. of the goods. Indeed, only Indians of the whole blood are completely exempted from the requirement.

Thus, the Arizona Supreme Court opinion is not at variance with the Hornell case, supra, because it deals with an issue not addressed in the reported decision, viz, whether or not a retail merchant not located on an Indian reservation is entitled to tax exemptions otherwise available to a licensed Indian trader in the business of Indian trading from a fixed place of business on a reservation. In point of fact, in view of the penalty and stringent forfeiture provisions of 25 U.S.C. § 264, it is somewhat ironic that CMC, rather than CMC's Indian customer, Gila River Farms, would seek support for its position in the Hornell case, supra.

III.

CONCLUSION

For the foregoing reasons, the appeal herein should be dismissed.

Respectfully submitted this 29th day of May, 1979.

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My commission expires:

1-17-81

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1604

CENTRAL MACHINERY COMPANY, *Appellant,*

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, *Appellee.*

On Appeal from the Supreme Court of Arizona

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November 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1979

No. 78-1604

CENTRAL MACHINERY COMPANY, *Appellant,*

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, *Appellee.*

On Appeal from the Supreme Court of Arizona

APPELLANT'S BRIEF

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 589 P.2d 426 (1978). The opinion of the Superior Court of Arizona for Maricopa County is unreported. Both opinions are printed at J.S. pp. 4a-14a.

JURISDICTION

The decision of the Supreme Court of Arizona was entered on December 4, 1978. A timely motion for rehearing was denied on January 23, 1979. Notice of

appeal to this Court was filed with the Supreme Court of Arizona on April 18, 1979, and the appeal was docketed on April 19, 1979. Probable jurisdiction was noted on October 1, 1979. Jurisdiction of this Court is invoked under 28 U.S.C 1257(2).

LAWS INVOLVED

The following are set out at J.S. pp. 1a-4a:

1. Ariz. Rev. Stat. 42-1309, 1312, 1361.
2. Act of Feb. 28, 1859, c. 66, 11 Stat. 388, 401.
3. 25 U.S.C. 261-264.

QUESTION PRESENTED

Did Arizona have jurisdiction to tax the sale of farm machinery by an Arizona corporation to an Indian tribe, where the sale took place within the tribe's reservation under the supervision of the Bureau of Indian Affairs?

STATEMENT OF THE CASE

The facts are not disputed and were stipulated by the parties. This case arises from a sale of eleven farm tractors by Central Machinery Company to Gila River Farms in 1973. Central Machinery Company is an Arizona corporation located at Casa Grande, Arizona. Gila River Farms, an enterprise wholly owned and operated by the Gila River Indian Community, farms tribal and individual trust land within the Gila River Reservation in south central Arizona.[1] The sale of the farm

[1] The Gila River Reservation is the reservation of the Gila River Indian Community, a federally recognized tribe organized under section 16 of the Indian Reorganization Act, 25 U.S.C. 476. The Gila River Indian Community includes Pima and Maricopa Indians.

equipment was solicited on the Reservation by Central Machinery, and the contract was made there. Payment for, and delivery of, the tractors also took place on the reservation.

The sales transaction was carried out under the supervision of the Superintendent of the Pima Agency, Bureau of Indian Affairs. The Plan of Operation of Gila River Farms, which provided for the purchase of farm equipment, was approved by the Superintendent and by his superior, the Area Director at Phoenix. Money was allocated for equipment in the Gila River Farms budget, which was also approved by the Superintendent and Area Director. Central Machinery did not possess a federal license to engage in continuous retail trade with Indians on the Gila River Reservation, nor did it have a permanent place of business on the reservation.

The Pima and Maricopa Indians and their ancestors have lived in and around the Gila River Valley for centuries.[2] The surrounding mountains are arid and forbidding, and the valley itself is hot and dry, but the land is fertile if irrigated, and the River has been used for this purpose since time immemorial.[3]

The Pimas and Maricopas are essentially agricultural people.[4] For them the Gila River valley was and is extremely valuable. Sophisticated methods of crop

[2] Gila River Pima-Maricopa Indian Community v. United States, 24 Ind.Cl.Comm. 301, 318 (1970).

[3] A. Bandelier, Final Report of Investigations among the Indians of the Southwestern United States 406 (John Wilson and Sons Univ. Press. (1890).

[4] *Id.* at 254.

irrigation have been used by them at least since the time of first white contact, and probably much earlier.[5] Their ancient predecessors, whom anthropologists call the Hohokam (a Pima word), used extremely elaborate and extensive irrigation methods in ancient times.[6]

In 1859, Congress authorized the President to establish a reservation for the Pima and Maricopa Indians in the area traditionally farmed by them near the Gila River in the Arizona portion of the Territory of New Mexico.[7] Additions were made to the reservation in a series of executive orders beginning in 1876,[8] because the original reservation did not encompass all of their traditional villages and fields.[9] Farming activities have been pursued continuously since that time by the Pimas and Maricopas, and tribal farming is presently a principel source of income for them.[10] After upstream non-Indian farmers diverted the water supply, Congress assisted tribal irrigated farming by providing funds for the construction of a modern irrigation system for lands in the vicinity of the Sacaton.[11] Funds

[5] N. 2 *supra*, 24 Ind.Cl.Comm. at 319.

[6] *Id.;* United States v. Gila River Pima Maricopa Indian Community, 586 F.2d 209, 211 (Ct.Cl. 1978).

[7] Act of Feb. 28, 1859, c. 66, 11 Stat. 388, 401 §§ 3-5; *see* J.S. pp. 2a-3a.

[8] Executive Orders of Aug. 31, 1876; Jan. 10, 1879; June 14, 1879; May 5, 1882; Nov. 15, 1883 in 1 C. Kappler, Indian Affairs, Laws and Treaties, 806-08; Executive Orders of Oct. 23, 1911; July 31, 1911 in 3 C. Kappler *supra* at 668.

[9] N. 2 *supra*, 24 Ind.Cl.Comm. at 333.

[10] Federal and State Indian Reservations and Indian Trust Areas, 51-52 (U.S. Dept. of Commerce 1974).

[11] United States v. Gila River Pima-Maricopa Indian Community, *supra* 586 F.2d at 211-12.

have since been provided for maintenance of the system.[12]

When Gila River Farms purchased farm tractors from Central Machinery, a tax in the amount of $2,916.62 was imposed on the sale by the State. Arizona levies a business privilege tax on persons doing business within the State, measured by the gross proceeds of sales within the State. Ariz. Rev. Stat. 42-1309, 1312, 1361, printed at J.S. pp. 1a-2a. This tax was added by Central Machinery as a separate item to the price of the farm machinery and was paid under protest by Gila River Farms. Central Machinery Company in turn paid the tax to the State under protest.

Central Machinery agreed to pay over any recovery to Gila River Farms, and appropriate administrative proceedings to claim a refund under Arizona law were initiated. The administrative application was denied, and Central Machinery brought this refund action in the Superior Court of Arizona for Maricopa County. That court held that Arizona had no jurisdiction to tax the transaction and ordered a refund. J.S. pp. 4a-6a. The Arizona Supreme Court reversed, one justice dissenting. J.S. pp. 7a-14a.

ARGUMENT

ARIZONA LACKS JURISDICTION TO TAX SALES TO GILA RIVER FARMS WITHIN THE GILA RIVER RESERVATION

A. The Federal Laws and Regulations Governing Indian Country Trade Preempt State Jurisdiction.

1. Review of the Warren Decision and Applicable Laws.

In *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court held that the

[12] *Id.*

federal statutes and regulations governing trade with Indians in Indian country preempted Arizona's jurisdiction to impose the same tax now at issue.[13] There as here the taxpayer was an Arizona corporation engaged in retail sales. In both cases the sales occurred within a tribal reservation.

In *Warren* the Court reviewed the statutes and regulations governing Indian trade and concluded that Congress "has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." 380 U.S. at 691. *See Rockbridge* v. *Lincoln,* 449 F.2d 567, 570-71 (9th Cir. 1971). The assessment and collection of the tax at issue here was held to "frustrate the evident congressional purpose of insuring that no burden be imposed upon Indian traders trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." 380 U.S. at 691.

Regulation of Indians affairs has traditionally and historically been an area in which the interest of the federal government is so dominant that state regulation is often precluded. *See Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832). The power of Congress to legislate in the area of trade with Indians is derived from Article I, Section 8, Clause 3 of the Constitution, which confers authority on Congress to regulate commerce with the Indian tribes.

Trade with Indians and tribes in tribal territory has in fact been the subject of close federal supervision since 1790. Forfeiture of all goods of an unauthorized

[13] Compare J.S. pp. 1a-2a with 380 U.S. at 686 n. 1.

seller has been a penalty since the first statute.[14] Other penalties and prohibitions were subsequently added.[15] The basic purpose of Congress was and is to deter fraud and overreaching of the Indians in order to carry out the trust obligations of the United States to a dependent people.[16]

The present statutes commit to the Commissioner of Indian Affairs "the sole power and authority to appoint traders to the Indian tribes." 25 U.S.C. 261.[17] The same section gives the Commissioner "sole power and authority" to make rules and regulations "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25

[14] 1 Stat. 137, § 3 (1790). The same penalty has appeared in every subsequent statute: 1 Stat. 329, § 3 (1793); 1 Stat. 471, § 8 (1796); 1 Stat. 745, § 8 (1799); 2 Stat. 142, § 8 (1802); 3 Stat. 332, § 2 (1816); 4 Stat. 729, § 4 (1834); R.S. 2133 (1873); 25 U.S.C. 264.

[15] Beginning with the 1793 Trade and Intercourse Act, 1 Stat. 329, § 3, the Indian trading laws have continuously included monetary penalties for unauthorized trade. Some requirements have also been backed by imprisonment as a penalty, *e.g.*, 2 Stat. 142, § 10 (unauthorized purchase of Indian horses), § 12 (unauthorized purchase of Indian land). A general review of the laws is found in F. Cohen, Handbook of Federal Indian Law 348-51 (U.S. Dept. Of Interior 1942).

[16] Rockbridge v. Lincoln, 449 F.2d 567, 570-71 (9th Cir. 1971); Cohen, *supra* n. 15 at 348-51 (describing trade with the Indian tribes as presenting "unlimited opportunities for corruption and extortion," p. 348); H.R. Rep. No. 474, 23rd Cong. 1st Sess. 11 (1834) (laws needed to control "fraud and imposition" on Indians).

[17] Control of Indian affairs was originally in the War Department and was transferred to the Interior Department in 1849. Cohen, *supra* n.15 at 10-11. Congress' permanent delegation of authority to the Commissioner of Indian Affairs in what is now 25 U.S.C. 261 was made in 1876. 19 Stat. 200, § 5.

U.S.C. 262 subjects "any person desiring to trade with the Indians on any Indian reservation" to the Commissioner's authority. 25 U.S.C. 263 authorizes the President to prohibit the introduction of "any particular article, into the country belonging to any Indian tribe." 25 U.S.C. 264 penalizes unlicensed trade, introduction of goods, or residence on a reservation for the purpose of trade.[18] The Commissioner has issued comprehensive regulations to carry out the statutory mandate. 25 C.F.R. pts. 251, 252.[19]

As this Court recognized in *Warren,* federal stauttory control over Indian commerce has mostly been confined to tribal territory. 380 U.S. at 690 n. 14.[20] The Indian Trade and Intercourse Act of 1970 regulated anyone who would attempt "to trade with the Indian tribes, or be found in the Indian country" with merchandise for sale to Indians.[21] The Act of 1793 had the same provision with an exception from the passport requirement for persons "merely travelling through any Indian town or territory." [22] The Acts of 1796, 1799 and 1802 had trade provisions applicable to "towns, or hunting camps, of any of the Indian tribes";

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[18] 25 U.S.C. 263, 264 are based on §§ 3, 4 of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729. 25 U.S.C. 261, 262 replaced parts of §§ 2, 3 of that Act.

[19] The regulations in force at the time Felix Cohen compiled his Handbook are discussed in Cohen, *supra* n.15 at 349-50.

[20] Two notable exceptions have been the control over Indian land rights wherever located, *see* 25 U.S.C. 81, 177, 323-416j; and the former prohibition of liquor sales to Indians, *see* 18 U.S.C. 1154, 1161.

[21] 1 Stat. 137, § 3 (1790).

[22] 1 Stat. 329, § 3 (1793).

"the Indian territory"; and "the Indian country." [23] An 1816 amendment to the 1802 Act applied to trade on lands held in "Indian title." [24]

The Indian Trade and Intercourse Act of 1834 made "Indian country" the sole term of place for its trade regulation provisions.[25] Indian country has been the basic term since that time and is now defined by statute.[26] It is undisputed that the Gila River Reservation, where the sale at issue took place, is within the statutory coverage of the trading laws.[27] In *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), the Court sustained a state gross receipts tax (much like the tax now at issue) imposed on a tribal business enterprise. The tax was sustained expressly because the enterprise was off-reservation, and the Court emphasized that the rule is otherwise within tribal territory. 411 U.S. at 148.

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[23] 1 Stat. 471, §§ 7, 8, 10 (1796); 1 Stat. 745, §§ 7, 8, 10 (1799); 2 Stat. 142, §§ 7, 8, 10 (1802).

[24] 3 Stat. 332, §§ 2, 3 (1816).

[25] 4 Stat. 729, §§1-7 (1834). Other provisions did not refer to "Indian country," *e.g.,* §§ 11, 12, protecting Indian land ownership.

[26] 18 U.S.C. 1151; *see,* United States v. John, 437 U.S. 634 (1978). This statute is in the criminal code, but the Court has indicated "that it generally applies as well to questions of civil jurisdiction." DeCoteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975). Congress has done the same, *e.g.,* 25 U.S.C. 1322.

[27] 25 U.S.C. 264 refers to Indian country, but it also applies to "any Indian reservation." The latter reference seems redundant under the current statute, 18 U.S.C. 1151. It was added in 1882, 22 Stat. 179, when there was no statutory definition of Indian country and thus possible doubt whether all reservations were Indian country. This Court probably settled the question by holding that a California reservation was Indian country in Donnelly v. United States, 228 U.S. 243 (1913).

2. The sale Was Not Taxable, Because It Was Subject to the Indian Trading Laws.

The federal laws regulating trade with Indians govern a sale to a tribe within Indian country. Trade with tribes is included in the terms of the statutes and regulations.[28] 25 U.S.C. 264, which indicates Congress' view of the scope of federal control, includes any person ("other than an Indian of the full blood") who attempts to introduce goods into Indian country or to trade therein, and these requirements are stated distinctly from the authority over resident merchants.[29] The statutes and regulations apply to any commercial transaction in Indian country involving Indians. *See, United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon,* 585 F.2d 978 (10th Cir. 1978).

The statutory purposes also encompass the transaction at issue. The federal regulatory goal to deter fraud and imposition on Indians would be easily circumvented if a seller could avoid regulation by the device of selling to Indian tribes as collective entities rather than to individuals. Because some tribes have recently achieved a degree of sophistication in modern business dealings, this proposition may be less absolute than formerly. But the laws at issue were enacted

[28] *See* 25 U.S.C. 261, 263; 25 C.F.R. 251.1, 251.2. *See also* R.S. 2128, 2132; U.S. Const. art. I, § 8, cl. 3, referring to "commerce with the Indian tribes." *Cf.*, Wilson v. Omaha Indian Tribe, —— U.S. ——, 61 L.Ed.2d 153 (1979), where the Court held that the term "Indians" in another section of the 1834 Trade and Intercourse Act, now 25 U.S.C. 194, includes tribes. 61 L.Ed.2d at 164-65.

[29] As noted previously, the relevant part of 25 U.S.C. 264 is unchanged since 1834, and its essential purpose has been part of the federal statutes since 1790. N. 14-18 *supra* and accompanying text.

in the early years of the Republic, when conditions were different. The laws must be interpreted in light of the circumstances of the years in which they were enacted. *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 206 (1978); *see, Wilson* v. *Omaha Indian Tribe,* —— U.S. ——, 61 L.Ed.2d 153, 165 (1979). It is for Congress to change the laws when it determines that conditions warrant amendments.

Since the transaction was subject to the trading laws, Arizona's jurisdiction to tax it was preempted. The manner and validity of the execution of the laws in any particular case cannot alter the scope of the statutes. *See* the views of the trial court and dissenting justice below, J.S. pp. 4a-6a, 10a-14a.

3. The Form of Federal Supervision Is Immaterial.

Arizona has attempted to distinguish this case from *Warren* by arguing that the transaction involved was outside the scope of the Indian trading laws, because Central Machinery did not have a federal license to engage in continuous retail trade with individual Indians on the reservation. The court below also relied on this distinction. J.S. p. 9a. This contention will not withstand analysis.

Administrative practice in enforcement of the Indian trading laws falls into three categories. The type of administrative supervision depends on the nature of the transaction involved and the degree to which the transaction would otherwise be unsupervised. First, resident merchants who deal regularly with individual reservation Indians are licensed after a rigorous application process requiring detailed information about the applicant and the type of business to

be established. 25 C.F.R. 251.9(a), 252.5. Approval of the Commissioner of Indian Affairs in Washington is required for these licenses. Second, the local Superintendent is authorized to give a license or permit to "itinerant peddlers" to trade with Indians on a reservation. 25 C.F.R. 251.9(b). This trade is of a more limited character, and the degree of supervision is correspondingly more limited. Third, trade with Indian tribes is subject to federal approval through direct supervision of the expenditure of tribal funds. No formal license is required, because transactions involving tribal funds are required to be supervised by statute.[30] There are added legal requirements of federal supervision where a tribal purchase relates to the use of tribal trust land or a federally-assisted Indian irrigation project.[31] All of these bases for supervision of tribal purchases were present in the case of Gila River Farms.

The sale of farm machinery to Gila River Farms was accomplished under the supervision of the Superintendent of the Pima Agency of the Bureau of Indian Affairs. As noted in the Statement of the Case, the expenditures of Gila River Farm were (and are) subject to approval of both the Superintendent and his superior, the Area Director at Phoenix. The Bureau's involvement in the transaction was much greater than is the case for transactions with individual Indians on a reservation. Under these circum-

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[30] *See, e.g.,* 25 U.S.C. 81-88, 111-165; 25 C.F.R. pt. 105. Other rules are contained in the Bureau of Indian Affairs Manual. *See, e.g.,* 83 BIAM ch. 6, detailing supervision over tribal budgets.

[31] *See* United States v. Gila River Pima-Maricopa Indian Community, *supra* 586 F.2d at 212; 25 C.F.R. 221.69a *et seq.; see also,* 25 U.S.C. 81, 177, 383-415d; 25 C.F.R. pts. 191, 211, 221.

stances the issuance of a license permitting the activity would have been pointless. In other words, a formal license is used to authorize otherwise unsupervised trade with individual Indians. Tribal purchases are directly supervised.

This administrative scheme for carrying out the trading laws is presumptively lawful. *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 660 (1976); *United States* v. *Jackson,* 280 U.S. 183, 193 (1930). Arizona has provided no valid basis to question the Bureau's manner of supervising Indian trade. For these reasons the difference in the form of federal supervision between *Warren* and the present case did not give taxing jurisdiction to the State here.

4. Central Machinery's Permanent Place of Business Is Immaterial.

Arizona has argued that *Warren* may be distinguished because there the seller had a permanent place of business on the reservation, while Central Machinery's permanent place of business is outside the Gila River Reservation at Casa Grande, Arizona. The State has also relied on the fact that some "dealer preparation" work on the farm machinery was performed at the Casa Grande location.

Arizona cannot seriously contend that Central Machinery's lack of a permanent place of business on the reservation without more gives the State taxing jurisdiction. Nothing in *Warren* or the statutes it interpreted supports such a requirement. The statutes and regulations are applicable according to the location of a commercial transaction; the permanent business headquarters of the seller is relevant only to the degree of supervision required. *See* Sec. A.3., *supra.* If a visiting

seller from another state, Indian reservation, or foreign country had made the sale at issue, the statutes would apply, and the *Warren* rule would preclude Arizona's tax.[32]

Arizona thus appears to rely on its authority over Central Machinery's off-reservation place of business and on the "dealer preparation" work there to give it the taxing jurisdiction otherwise denied by *Warren*. But Arizona's tax is measured by the aggregate value of sales transactions subject to state jurisdiction. It is not measured by the value of Central Machinery's property at Casa Grande, nor by the value added to the machinery by dealer preparation work. Property and value-added taxes might present different issues.

An analogous argument was rejected by the district court in *Confederated Salish & Kootenai Tribes* v. *Montana*, 392 F.Supp. 1325 (D. Mont. 1975) (3 judge ct.), *aff'd*, 425 U.S. 463 (1976). Montana argued that it had jurisdiction to impose its *ad valorem* property tax on automobile ownership by reservation Indians, because the Indians' automobiles were sometimes driven off the reservation. The court rejected the argument because the "tax event" under Montana law was ownership of the vehicle, not highway use. 392 F.Supp. at 1327. In the instant case, the "tax event" was the sale of farm machinery to Gila River Farms.

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[32] In its Motion to Dismiss (at pp. 9-12, 22) Arizona relied on two administrative rulings, 58 I.D. 562 (1943); 57 I.D. 124 (1940), but the Motion misstated the 1943 holding. The transactions held to be taxable were certain off-reservation sales to individual Indians, reversing the contrary view in the 1940 opinion. On sales within reservations, both opinions agreed that state taxing jurisdiction was preempted. 58 I.D. at 563; 57 I.D. at 126. Contrary to Arizona's contention, neither opinion was dependent on the merchant's permanent place of business.

Arizona argues that its tax is a "privilege" tax rather than a "sales" tax. This purported distinction was rejected by the Court in *Warren*. Its only legal relevance is to attempt to designate that the party liable for the tax is the seller alone rather than the buyer or both of them.[33] On that very basis, the Arizona Supreme Court in *Warren* had sustained the tax,[34] but this Court reversed. Consideration of the party liable aside, the tax is measured by the value of the sale; the sale is the "tax event." Arizona expects the tax to be added to the price of the merchandise, and it is in practice. Nor does Arizona attempt to tax resident sellers based on sales transacted in other states or nations.

If the Warren Trade Post Co. had had a second place of business in Phoenix, that could not have changed the result of the *Warren* decision.[35] Or if the Warren Trading Post Co. had made an off-reservation sale of farm machinery to an Indian tribe, Arizona would surely claim the right to tax it notwithstanding the company's federal license and on-reservation place of business.[36]

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[33] This concept has been called "incidence" of the tax, *e.g.*, First Agricultural Nat. Bank v. State Tax Comm'n, 392 U.S. 339, 347 (1968).

[34] Warren Trading Post Co. v. Moore, 95 Ariz. 110, 387 P.2d 809, 812 (1963), *reversed sub nom.* Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

[35] The opinion in that case did not indicate whether the Warren Co. had other places of business outside the Navajo Reservation. Implicitly, that was not deemed material.

[36] As we indicated under part A.1 above, federal regulation of Indian trade has always been much less extensive outside tribal territory. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

To base Arizona's taxing jurisdiction on Central Machinery's off-reservation place of business would also put Central Machinery at a competitive disadvantage to out-of-state sellers lacking any such place of business. It is not reasonable or logical to construe the scope of preemption under the federal Indian trading laws to produce this result.

B. Arizona's Tax Interferes with the Federal Purposes of the Gila River Reservation.

1. The Transaction in this Case Involves Irrigated Farming, the Basic Economic Purpose of the Reservation.

The sale of farm machinery to Gila River Farms involves one of the essential purposes for which the Gila River Reservation was established. In 1859, Congress authorized the President to establish a reservation for the Pima-Maricopa Indions. The reservation set aside for the Tribes included the area where they had traditionally practiced irrigated farming since before white contact.[37]

Gila River Farms is the tribal agricultural enterprise engaged in farming some of the tribal lands around Sacaton, Arizona, that have been farmed by the Tribes for hundreds of years. *See,* Statement of the Case, *supra.* Gila River Farms has been a successful enterprise and is the principal source of income for the Tribes.[38]

The purchase of farm equipment from Central Machinery was undertaken by Gila River Farms in fur-

[37] Gila River Pima-Maricopa Indian Community v. United States, *supra,* 24 Ind.Cl.Comm. at 391.

[38] Federal and State Indian Reservations and Indian Trust Areas 51-52 (U.S. Dept. of Commerce 1974).

therance of its agricultural activities. Taxation of this transaction by Arizona thus impermissibly burdens the basic economic purpose of the reservation itself. *See, Tulee* v. *Washington,* 315 U.S. 681, 684-85 (1942); *Winters* v. *United States,* 207 U.S. 564, 566-67, 576-77 (1908).

Numerous decisions of this Court have consistently recognized the importance of the purposes for which Indian reservations were established and have implied Indian rights and immunities in order to fulfill those purposes. *Arizona* v. *California,* 373 U.S. 546, 594-601 (1963); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); *Winters* v. *United States, supra; United States* v. *Winans,* 198 U.S. 371, 381 (1905). In the area of taxation, this Court has also consistently held that State taxes which interfere with the purposes for which Indian trust lands are set aside are invalid. *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 158-59 (1973); *Tulee* v. *Washington, supra,* 315 U.S. at 684-85; *United States* v. *Rickert,* 188 U.S. 432, 441-43 (1903); *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867). Arizona's tax is therefore invalid because it burdens the basic economic purpose of the Gila River Reservation.

2. The Tax Interferes with Tribal Self-Government.

In *Warren,* imposition of Arizona's transaction privilege tax was struck down on the ground that state law had been preempted by comprehensive federal regulation of Indian trade. The tax was also invalidated because it constituted state interference with tribal self-government. 380 U.S. at 686-87. *See McClanahan* v. *Arizona Tax Comm'n,* 411 U.S. 164, 170

n. 6, 172-75 (1973). In *McClanahan,* such interference alone was a sufficient basis to invalidate the imposition of Arizona's income tax on a reservation Indian deriving her income from reservation sources. *McClanahan* was followed in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 480-81 (1976), to invalidate a state cigarette sales tax and personal property tax imposed on reservation sales to Indians.

The right of tribal self-government in each case was paramount. State taxation of Indian activities within a reservation was held to be impermissible in the absence of congressional consent. *McClanahan* v. *Arizona Tax Comm'n, supra; Mescalero Apache Tribe* v. *Jones, supra,* 411 U.S. at 148.

When the Gila River Reservation was set aside in 1859, the Pima and Maricopa Indians, like the Navajo Tribe in *Warren,* were left to govern themselves and allowed to live according to their customary ways and traditions without interference.[39] The area was set aside for the Pimas and Maricopas as an area within their exclusive sovereignty, subject to federal supervision. As the Court noted in *McClanahan, supra,* 411 U.S. at 175-76, the right of tribal self-government was preserved in the Arizona Enabling Act, 36 Stat. 569

[39] *See* Gila River Pima-Maricopa Indian Community v. United States, *supra,* 24 Ind.Cl.Comm. at 333.

(1910). Under the principles set out in the opinions in *Warren* and *McClanahan,* state taxation of Indians or tribes within a reservation constitutes interference with tribal self-government and is invalid.

Moreover, Arizona's tax necessarily conflicts with any tax which the Tribe might impose on merchants doing business within the reservation. The power of tribal governments to enact such a tax was sustained in *Buster* v. *Wright,* 135 F. 947, 949-51 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906); *see Maxey* v. *Wright,* 3 Ind.T. 243, 54 S.W. 807 (1900), *affirmed* 105 F. 1003 (8th Cir. 1900). Congress has acted affirmatively to encourage Indian tribes to exert their powers of self-government and to pursue economic development. *See* Indian Reorganization Act of 1934, 25 U.S.C. 461-479; Indian Self-Determination and Assistance Act of 1975, 25 U.S.C. 450 *et seq.;* Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.* The Gila River tribal constitution specifically authorizes tribal taxation of nonmembers doing business within the reservation (subject to approval by the Secretary of the Interior). Const. of the Gila River Indian Community, art. XV, § 1(b)(3), under the Indian Reorganization Act, 25 U.S.C. 476. The lawful objectives of a tribal tax on merchants doing business within the reservation would be frustrated by the imposition of a state tax on the same activity.

CONCLUSION

For the reasons stated, the decision of the Arizona Supreme Court should be reversed.

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November 1979

FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 17 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

October Term, 1979

No. 78-1604

CENTRAL MACHINERY COMPANY,

Appellant,

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA,

Appellee.

BRIEF OF THE APPELLEE

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In the
Supreme Court of the United States

October Term, 1979

No. 78-1604

CENTRAL MACHINERY COMPANY,
Appellant,
v.
STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA,
Appellee.

BRIEF OF THE APPELLEE

INTRODUCTION

The Statement of the Case submitted by Central Machinery Company (hereinafter "CMC") correctly observes that the material facts are not in dispute and that the case was submitted upon a stipulation of facts. *See,* Record on Appeal, Second Agreed Statement of Facts, Item 15. However, after reciting a few of the material facts contained therein, CMC discusses a number of facts which are technically not a part of the record relating to the history of the Pima and Maricopa Indians and which facts bear little relevance to the proper resolution of the narrow legal question presented herein, *viz.,* is the Arizona transaction privilege tax applicable to CMC upon the facts of record?

It is the Appellee's position that the facts that (1) CMC is a non-Indian Arizona corporation doing business in Casa Grande, Arizona, (2) CMC had neither a federal Indian traders license nor itinerant peddlers permit and (3) the sale of the tractors in question was executed on a purchase

order that included not only the economic burden of the tax in question, but the economic burdens of various other of CMC's state taxes blended into the purchase price as undifferentiated cost components, (*see*, Record on Appeal, Second Agreed Statement of Facts, Item 15, pp. 15-15d), establish that the taxes were and are properly imposed upon the taxpayer, Central Machinery Company. In an attempt to address all of the points raised by CMC and the United States as amicus curiae in a unified fashion, the issues will be treated in this single brief.

SUMMARY OF ARGUMENT

Arizona does not tax "sales", as CMC and the United States apparently erroneously believe. The Arizona transaction privilege tax is imposed upon the separate and distinct activity of the exercise of the privilege of engaging in business. Thus, the rationale of *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965) is inapplicable in this case. Moreover, in view of the decision in *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973), it is the Appellee's further position that the conclusion in footnote 18 in the *Warren* case (*i.e.*, that the Buck Act, 4 U.S.C. §§ 105-110, does not apply to Indian reservations) should be reconsidered.

Finally, although neither CMC nor the United States as amicus curiae specifically urge the issue under *Williams v. Lee,* 358 U.S. 217 (1959), the state tax in question as imposed upon CMC does not infringe upon any right of self-government enjoyed by CMC's customer, the Gila River Farms. Furthermore, the argument of the United States that Article 1, Sec. 8, Clause 3 of the Constitution (the Commerce Clause) preempts the state tax of its own force is without merit.

For the foregoing reasons, the judgment of the Arizona Supreme Court should be affirmed.

I

THE APPELLANT AND AMICUS CURIAE MISPERCEIVE THE NATURE OF THE ARIZONA TRANSACTION PRIVILEGE TAX

It must be noted at the outset that both CMC and the United States as amicus curiae premise each argument of their respective briefs upon a fundamental mistake of law. That mistake is this: both the taxpayer and the United States erroneously assume and/or assert that the taxable event under the Arizona statutes in question (*i.e.*, Ariz. Rev. Stats. §§ 42-1309, 42-1312 and 42-1361: *see*, J.S., 1a-2a), is the "sale" transaction whereby title and possession of tangible personal property is transferred from a vendor to a vendee for a consideration. *See*, Ariz. Rev. Stats. § 42-1301.[1] The fact of the matter is that Arizona does not have a "sales" tax, that is, a tax which contemplates as the taxable event the actual act of title and/or possession transfer. On the contrary, from the very enactment of the Arizona transaction privilege tax in 1935 (*see*, Ariz. Laws 1935, Ch. 77), the Arizona transaction privilege tax has been imposed upon the exercise of the privilege of engaging in business. The Arizona Supreme Court has consistently held that *this* is the taxable event rather than the act of title and/or possession transfer. *See, Arizona State Tax Commission v. Garrett Corporation,* 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955) and cases cited therein.

The determination by the Arizona Supreme Court that the taxable event under the transaction privilege tax is the exercise of the privilege of engaging in business as distinguished from the actual "sale" is not only consistent with the language of the statute imposing the tax (*see*, Ariz. Rev. Stat. § 42-1309; J.S., p. 1a), its decisions are consistent with

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[1] During the relevant time in question, Ariz. Rev. Stat. § 42-1301, in pertinent part, defined "sale" as:

"... any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration ...."

the statute's reasonable interpretation, given the Legislature's stated objective. Accordingly, these rulings constitute a definitive determination as to the meaning of the statute which renders the decision as to its nature binding and conclusive as a matter of law. *Gurley v. Rhoden,* 421. U.S. 200, 208 (1975); *American Oil Co. v. Neill,* 380 U.S. 451, 455-456 (1965); *Alabama v. King & Boozer,* 314 U.S. 1, 9-10 (1941).

Thus, the frequent references by both CMC and the United States to the "fact" that the sale of the tractors in question occurred within an Indian reservation and/or that the sale is the "tax event" (*see e.g.,* Appellant's Brief, pp. 14-15) are plainly erroneous. The taxable activity herein is the exercise of the privilege of engaging in business within the State of Arizona beyond the boundaries of any Indian reservation at all. It is an admitted fact that Central Machinery Company maintains no place of business upon any Indian reservation within Arizona and is in fact a non-Indian Arizona corporation doing business in Casa Grande, Arizona. (J.S., p. 3; Appellant's Brief, p. 2). The fact that one of its sale transactions may have transpired in a particular portion of Arizona (*i.e.,* within the boundaries of the Gila River Indian Reservation) cannot alter the fact that the gross receipts received from that title/possession transfer constitute nothing more than the *measure* of the separate taxable activity, *viz.,* engaging in business within the State of Arizona. *Arizona State Tax Commission v. Garrett Corporation, supra; Arizona State Tax Commission v. Southwest Kenworth, Inc.,* 114 Ariz. 433, 561 P.2d 757 (Ct. App. 1977), *cert. denied* 434 U.S. 834 (1977).

Accordingly, as a result of this manifest threshold error on the part of both CMC and the United States as amicus curiae, this dispute is technically at an end and the decision of the Arizona Supreme Court should be affirmed. Under Arizona law, the proper measure of the taxable activity of engaging in business within Arizona includes the gross receipts received from sale transactions occurring within the State of Arizona. Clearly, the Gila River Indian Reservation exists wholly within the exterior boundaries of Arizona. *Cf. Surplus Trading Co. v. Cook,* 281 U.S. 647, 650-651 (1930).

Indeed, even if one were to assume that the Gila River Indian Reservation were, for example, not a part of Arizona,[2] the fact that the transfer of title and/or possession to the tractors purportedly transpired beyond the jurisdictional reach of the State of Arizona does nothing to alter the fact that the taxable activity *did* occur beyond the limits of any Indian reservation and was properly within the jurisdiction of the State of Arizona to tax.

In this regard, CMC contends (Appellant's Brief, p. 15) that it is the State's position that its tax is a "privilege" tax rather than a "sales" tax, and that:

> "This purported distinction was rejected by the Court in [*Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965)]. Its only legal relevance is to attempt to designate that the party liable for the tax is the seller alone rather than the buyer or both of them." (Footnote omitted)[3]

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[2] *See,* for example, Appellant's Brief, p. 15, where the statement is made: "Nor does Arizona attempt to tax resident sellers based on sales transacted in other states or nations." Arizona does not tax "sales", whether they occur in this State, another state, another nation or another continent. Arizona does, however, properly tax businesses with a sufficient nexus to the State of Arizona for the privilege of engaging in business within this State and properly requires the inclusion in the measure of that activity the gross receipts and/or the gross income which may be received from title and/or possession transfers transpiring beyond the geographic boundaries of Arizona. *See, Norton Company v. Department of Revenue of State of Illinois,* 340 U.S. 534 (1951); *Arizona State Tax Commission v. Southwest Kenworth, Inc.,* 114 Ariz. 433, 561 P.2d 757 (Ct.App. 1977), *cert. denied* 434 U.S. 834 (1977).

[3] In support of this position, CMC cites *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339, 347 (1968).

By this statement, CMC displays the second fundamental error burdening its position: the Arizona Supreme Court has not only ruled with respect to the distinction between the "legal incidence" and the "economic incidence" of the Arizona transaction privilege tax, it has also specifically passed upon the *nature* of the tax. That is to say, the highest court of the State of Arizona has determined two things, *viz.*, (1) that the legal incidence of the tax is upon the vendor or businessman alone *and* (2) that the nature of the tax is that of a business privilege excise tax rather than a true sales (*i.e.*, title/possession transfer) tax. *Arizona State Tax Commission v. Garrett Corporation, supra.*

To contend that the ". . . only legal relevance . . ." of such a distinction is to decide the question of where the legal incidence of the tax falls is an incomplete and therefore inaccurate analysis of the Arizona law. Even under this Court's decision in *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965), if the taxable activity — as distinguished from the *measure* of said activity — takes place beyond the boundaries of an Indian reservation, non-discriminatory state laws, including tax laws, apply to persons who may otherwise have dealings with Indians. *See, Taylor v. United States,* 44 F.2d 531 (9th Cir. 1930), *cert. denied,* 283 U.S. 820 (1931); 57 I.D. (Decisions of the Department of Interior) 124, 125, both cited with approval in *Warren,* 380 U.S. at 690, n. 14. This rule applies even in situations where the direct legal incidence of the state tax is imposed upon an Indian or Indian tribe. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); 57 I.D. 124, 125; 58 I.D. 562, 563-567.

Accordingly, under this Court's decisions in the *Gurley, Boozer* and *Neill* cases, *supra,* the Arizona Supreme Court's prior determinations as to both the legal incidence of the

tax and the nature of the tax should be declared conclusively binding insofar as the present dispute is concerned, thereby necessitating the affirmation of the lower court decision.

II

THE DECISION IN THE WARREN CASE IS NOT CONTROLLING

Both CMC and the United States as amicus curiae contend in their respective briefs that this Court's decision in *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965) controls the outcome of this case.[4] It is the State's position that, in view of the fact that the taxable event in the present dispute transpired beyond the boundaries of any Indian reservation, the decision in the *Warren* case is distinguishable and therefore inapplicable.

In *Warren,* this Court held that the Arizona transaction privilege tax could not be applied to the exercise of the privilege of engaging in business by a non-Indian federally licensed Indian trader located upon the Navajo Indian Reservation with respect to his business activities involving reservation Indians. In reaching that conclusion, this Court was presented with two alternate bases for decision by the taxpayer. In terms of the question presented to this Court in the jurisdictional statement filed by the Warren Trading

[4] An additional contention is advanced for the first time on appeal (and not by the taxpayer, but by the United States as amicus curiae), that Art. 1, Sec. 8, Clause 3 of the U.S. Constitution (the Commerce Clause) in and of itself results in constitutional preemption even without regard to the federal regulatory scheme discussed in the *Warren* decision. Assuming, *arguendo,* that this brand new issue is properly before this Court, it being advanced by an amicus curiae rather than Central Machinery Company, the fact of the matter is that the discussion by the United States (United States Amicus Curiae Brief, pp. 9-16) is not only in error, it actually supplies additional support for the conclusion that the present tax was properly applied to Central Machinery Company. This aspect of the amicus curiae brief will be discussed in Argument IV, *infra.*

Post Company,[5] the primary concern was whether or not the Arizona statutes in question were repugnant to and in violation of Article 1, Sec. 8, Clause 3, the Commerce Clause. As an alternate ground, the taxpayer urged that the federal Indian traders statutes and implementing regulations preempted Arizona's tax.

It is important to note that this articulates two distinct concerns, the primary one embraced by Article 1, Sec. 8, Clause 3, the Commerce Clause, and only secondarily a concern embraced by Article 6, Sec. 2, the Supremacy Clause. In its decision, this Court specifically reserved a ruling on the Commerce Clause basis and instead decided the case on the secondary issue, that is, the preemption issue. This Court specifically found it unnecessary to consider whether the tax was prohibited by the Commerce Clause in view of the fact that, in its view, the state statutes were preempted by the federal regulatory scheme. *See*, 380 U.S. at 686.

After examining the various federal statutes and regulations applicable to the licensed Indian trader located on the Navajo Reservation doing business with reservation Indians,[6] this Court held, 380 U.S. at 690, that the regulations and statutes authorizing them seemed sufficient to demonstrate that

> "... Congress has taken the *business* of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.[14]" (Emphasis added)

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[5] *See*, Jurisdictional Statement, *Warren Trading Post Company v. Arizona State Tax Commission*, USSC Doc. No. 115, October Term, 1964, p. 6.

[6] Interestingly, the Warren Trading Post Company did not challenge the State's right to impose the transaction privilege tax directly upon it with respect to its business activities on the reservation with non-Indians. *See*, 380 U.S. at 686, n.1.

Footnote 14 in the foregoing quote specifically cited *Taylor v. United States, supra*, and 57 I.D. 124, 125. That Interior Department opinion there states, *inter alia:*

> "These statutes [*i.e.*, 25 U.S.C. §§ 261-266], by their terms or by judicial construction, are limited in their application to Indian reservations. (Citations omitted) Congress has not exercised its power to regulate trade with the Indians insofar as trade off the reservation is concerned except in the traffic in liquor."

The Interior Department opinion continues, however, 57 I.D. at 126:

> "In the review of the relationship between the federal government and the state government on an Indian reservation, in *Surplus Trading Co. v. Cook*, 281 U.S. 647 [(1930)], the Supreme Court stated that the jurisdiction of the state over the reservation is full and complete save as to the Indians and their property."

Thereafter, the opinion specifically concludes that where traders are not *located*[7] on Indian reservations they were responsible for the state taxes and subject to licensure whether or not they were Indians and "... whether or not they deal with Indians." *See*, 57 I.D. at 126.

Based upon the foregoing, it is the State's position that the rationale of *Warren* is inapplicable to the case *sub judice* for the simple reason that the area that has been preempted is that of engaging in the business of Indian trading on an Indian reservation. There is no discernible intent in either the *Warren* decision or the relevant congressional enactments evincing an objective to draw within the scope of the preempted area any and all mercantile

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[7] The term "located" embodies a concept involving more than mere transitory physical presence in a particular place. *Cf. Federal Power Commission v. Texaco, Inc.* 377 U.S. 33, 37-39 (1964).

trade activities ocurring between Indians and non-Indians. Quite simply, CMC is not a licensed Indian trader not only because it lacks the required federal license, but because it does not fit the definition of a licensed Indian trader.

A.

CMC is Neither a Trader nor an Itinerant Peddler Within the Federal Provisions Herein

With respect to the observations of CMC and the United States that the lower court decision appeared to be based upon the fact that the tax was properly imposed because CMC was not in compliance with federal law, such a circumstance, while perhaps not dispositive, is nonetheless germane vis à vis the question of whether or not CMC would have been entitled to hold such a license in the first place. As a practical matter, it makes no sense to characterize CMC as either being engaged in the business of Indian trading on an Indian reservation or as being properly termed an "itinerant peddler" within the meaning of 25 C.F.R. Part 251, specifically, 25 C.F.R. § 251.9(b).

On this latter point, CMC resembles an "itinerant peddler" to an even less degree than does it resemble an Indian trader engaged in the business of Indian trading with Indians on an Indian reservation. This Court has specifically held that a peddler is one who travels from place to place, selling goods carried about with him, and *not* those who solicit orders for the future delivery of goods to be shipped in

the course of commerce. *Crenshaw v. Arkansas*, 227 U.S. 389 (1913).[8]

Thus, the reliance by both CMC and the United States upon *United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978), is misplaced. There, a *qui tam* action was brought against a non-Indian automobile dealership for the unlawful introduction into the Navajo Indian Reservation of an automobile purchased by two Navajo Indians. The action was brought under 25 U.S.C. § 264, which statute states in unequivocal terms, that "... any *person* ..." (emphasis added) who introduces goods into or attempts to trade within an Indian reservation without the mandatory federal license shall forfeit all merchandise offered for sale and be liable to a $500 penalty.

Insofar as the *Hornell* decision is concerned, the term "any person" means just that: it applies to bona fide itinerant peddlers as well as to automobile salesmen and other people who do not fit the defined class of peddlers. In other words, insofar as 25 U.S.C. § 264 is concerned, while all bona fide itinerant peddlers fall within the class "any person," not all persons fall within the class "itinerant peddlers." The obvious purpose of the statute is to ensure that any and all trade within the Indian reservation shall be conducted in strict compliance with the federal requirements. There is no exception set forth in the statute and none should be implied in view of the penal nature of the

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[8] The *Crenshaw* case appears to be the most recent decision of this Court square on point. *See, also, Emert v. Missouri*, 156 U.S. 296 (1895). There are, however, numerous decisions from lower courts articulating the same rule. *See, e.g., Campbell Baking Co. v. City of Harrisonville, Mo.*, 50 F.2d 670, 675 (8th Cir. 1931), *ovrl'd on other grounds* 64 F.2d 755 (8th Cir. 1933); *People v. Smith*, 312 N.Y.S.2d 392, 63 Misc.2d 418 (1970); *State v. Jobin*, 58 Ariz. 141, 118 P.2d 97 (1941), *rev'd on other grounds*, 319 U.S. 103 (1943). *See*, Record on Appeal, Second Agreed Statement of Facts, Item 15, pp. 15, 15c, 15d.

legislation. Thus, the reliance placed upon *Hornell* by both CMC (Appellant's Brief, p. 10) and the United States (United States Amicus Curiae Brief, p. 5) is conceptually obscure.

B.

General Principles of Federal Preemption do not Forbid or Displace the State Tax

At this juncture, a brief examination of basic doctrines of federal preemption may be beneficial. As previously indicated, the source of the federal preemption power is Article 6, Section 2 of the Constitution, the Supremacy Clause. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-152 (1963). Under this section, federal enactments constitute the supreme law of the land. However, where state laws exist beyond the areas affected by federal law, the Supremacy Clause does not require their preemption or displacement.

In this regard, this Court has held that the federal judiciary must be vigilant to insure that the application of state law poses no significant threat to any identifiable federal policy or interest, *Burks v. Lasker*, ___ U.S. ___, 99 S.Ct. 1831, 1838 (1979), quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Furthermore, before a preemption of state law can occur, the actual or asserted clash between the two should not be trivial or insubstantial, but must be of substance. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 423 n.20 (1973). Only when the state and federal laws are absolutely and totally contradictory and repugnant must the state laws fall. *Goldstein v. California*, 412 U.S. 546, 553 (1973).

Insofar as the preemption doctrine was applied by this Court in *Warren*, the decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) formed the basis for the application of the principle. In that case, notions of federal preemption were premised, in general, upon three basic concepts, *viz.*, pervasiveness of federal regulation, domination of federal interest and unhampered operation of federal laws. While these factors might, at first glance, appear to constitute a comprehensive "test" for federal preemption through "occupation of field," the three criteria appear to have been applied in such a fashion infrequently.[9]

In view of the foregoing, therefore, a brief examination of the preemption cases decided after *Rice*, it is submitted, will reveal a modification of the somewhat stringent criteria set forth therein vis à vis the continued application of state laws. For example, this Court's recent decision in *DeCanas* articulates a rule that, while the Supremacy Clause requires the invalidation of state laws which directly burden or conflict with federal laws or treaties, state laws which may conflict with federal objectives, absent any repealing or exclusivity provisions, need not be completely displaced but need be preempted only insofar as necessary to protect the achievement of the aims of the federal law, since "... the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding the [state scheme] completely ousted'" *See, DeCanas, supra*, 424 U.S. at 357-358, n.5.[10]

Moreover, the opinion quoted with approval (424 U.S. at 360, n.8) from the dissenting opinion of Justice Stone in *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941), wherein he stated that, while every act of Congress occupies some field, the boundaries of the field must be first ascertained before it can be determined whether a state law must be preempted. To discover these boundaries, Justice Stone observed (312 U.S. at 79), one must "... look to the federal statute itself, read in the light of its constitutional setting and its legislative history."

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[9] *See, e.g., Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

[10] This objective of reconciling conflicts rather than preempting altogether represents a modification of the ruling in Rice.

Accordingly, the decision in *DeCanas* appears to have ameliorated the stringent statement contained in *Rice, supra*, 331 U.S. at 230, that the "... scheme of federal legislation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement." If, in fact this is the case, then a more detailed examination of the basis of the holding in *Warren* appears to be indicated.

An examination of the briefs of both CMC and the United States as amicus curiae will immediately reveal that the basis for the contention that the transaction privilege tax in question has been preempted is that portion of the decision in *Warren* based upon the holding in *Rice*. As will be hereinafter demonstrated, however, it is the position of the Appellee that not only is the rule of *Rice* inapplicable upon the facts of the present case, the rationale of *Warren*, including its analysis of the applicability of the Buck Act (4 U.S.C. §§ 105-110), does not prevent the application of the taxes herein.

C.

The McClanahan Decision Necessitates a Re-examination of Footnote 18 in Warren.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973), held that Arizona could not impose the direct legal incidence of its personal income tax upon a reservation Indian. Although various bases were cited by the Court in support of this result, insofar as the present dispute is concerned, one of them is particularly germane. In support of the ruling, this Court stated, 411 U.S. at 176:

> "... Congress' intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § 105 *et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas.*" (Emphasis added)

Although the opinion thereafter qualifies that statement by observing that the Buck Act (*i.e.*, 4 U.S.C. §§ 105-110) cannot be read as an affirmative grant of tax-exempt status to reservation Indians, which observation addresses itself to the substantive question involved therein (that is, whether or not the direct legal obligation for a state tax may be imposed upon a reservation Indian[11]), the statement is highly material to the question of the continued vitality of the conclusion in footnote 18 in *Warren. See, Warren, supra*, 380 U.S. at 691, n.18.[12]

Without regard to the substantive application of the Buck Act to Rosalind McClanahan's situation,[13] the discussion of the Buck Act in the *McClanahan* case implicitly acknowledges the applicability of the legislation to Indian reservations. No other rational interpretation or meaningful conclusion may be accorded to the Court's language, 411 U.S. at 176, "... the Buck Act ... provides comprehensive federal guidance for state taxation of those living within *federal areas.*" (Emphasis added)

Accordingly, and in conformity with this Court's ruling in *DeCanas, supra*, 424 U.S. at 360, n.8, an examination of the Buck Act, read in the light of its constitutional setting and its legislative history, is necessary.

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[11] *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976).

[12] In footnote 18 in *Warren*, this Court relied upon various sources to arrive at the conclusion that the Buck Act, 4 U.S.C. §§ 105-110, was not intended by Congress to apply to Indian reservations. In addition, the final sentence of the footnote indicated that, even assuming that the Arizona transaction privilege tax was "... of a kind to which the Buck Act applies, nothing whatever in that Act suggests to us that Congress meant to give states new power to tax federally licensed traders. *See* 58 I.D. 562."

[13] 4 U.S.C. § 109 exempts Indians "... not otherwise taxed ..." from the direct levy of state sales, use and income taxes otherwise applicable under 4 U.S.C. §§ 105 and 106 within "federal areas" as defined in 4 U.S.C. § 110(e). *See, Appendix, infra.*

(1)

The History of the Buck Act Supports the Application of this Tax.

In *McClanahan,* the Court's analysis focused upon the application of one portion of the Buck Act: 4 U.S.C. § 109. That statute grants reservation Indians an exemption from the direct legal imposition of state sales, use or income taxes otherwise applicable within federal areas under 4 U.S.C. §§ 105 or 106. A disparity, however, arises upon an examination of footnote 18 in *Warren.* It was there held that, since Indian reservations were not "federal areas" within the meaning of 4 U.S.C. § 110(e), 4 U.S.C. §§ 105 and 106 did not apply to Indian reservations. The inconsistency thus arises: if an Indian reservation *is* a "federal area" for purposes of 4 U.S.C. § 109, what explanation exists for concluding that an Indian reservation is *not* a "federal area" for purposes of 4 U.S.C. §§ 105 and 106? Indeed, the decision in *McClanahan*—while on the facts of that case independently justifiable—acknowledges that, for purposes of 4 U.S.C. § 109, the Buck Act is germane to the inquiry, if at all, *only* if an Indian reservation is a "federal area."

At this juncture, the legislative history of the Buck Act becomes highly relevant. The first version of what later came to be the Buck Act was introduced in 1939 by Representative Frank H. Buck of California. He sought to provide for the application of state sales and use taxes in those areas where the federal government "... may have jurisdiction." *See,* H.R. 6687, 76th Cong., 1st Sess., 84 Cong.Rec. 6737 (1939). The legislation failed to pass in 1939, but it was reintroduced the following year, at which time the Senate Finance Committee made various amendments to the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt the imposition of state taxes, whether sales, use, or income, upon reservation Indians. *See,* S.Rep.No. 1625, 76th Cong., 3rd Sess. (1940); Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3rd Sess., (April 23, 1940) (hereinafter "Hearing"). H.R. 6687 was eventually passed by Congress and, after reenactment and codification in 1947, the bill became the present 4 U.S.C. §§ 105-110, popularly known as the "Buck Act".

Congressman Buck had prepared for the April 23, 1940 hearing a report setting forth the purpose of the Act, Hearing, *supra,* pp. 3-4:

> "Recent decisions of the Supreme Court of the United States in the cases of ... [cases omitted], [14] while opening the way for the application of certain nondiscriminatory State taxes on Federal areas, except insofar as those taxes may constitute a burden upon the United States, have not clearly indicated the exact extent of state authority in this respect.
>
> "Divergent views being expressed by taxpayers and taxing authorities makes [*sic*] it evident that prolonged and expensive litigation will be required to clarify the law on the subject if the limits of State authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainity which will necessary [*sic*] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action, a precedent for which is to be found in an Act of Congress approved June 16, 1936, amending Section 10 of the Hayden-Cartwright Act

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[14] The cases to which Congressman Buck referred were *James v. Dravo Contracting Company,* 302 U.S. 134 (1937), *Silas Mason Company v. Tax Commission,* 302 U.S. 186 (1937), and *Atkinson v. State Tax Commission,* 303 U.S. 20 (1938).

(49 Stat. 1521; 23 U.S.C.A., § 55a) relating to State motor vehicle fuel taxes.[15]

. . .

"A minor problem presented with respect to the application of State sales taxes on Federal areas involves the responsibility for such taxes of post exchanges, ship-service stores, commissaries, *licensed traders*, and other similar agencies operating on Federal areas." (Emphasis added).

The question of whether or not the grant of taxing authority under consideration should apply to Indian reservations was thus specifically considered. In fact, Representative Buck stated (Hearing, p.2) that, in his personal experience, a problem existed with respect to taxes on sales

". . . at commissaries, *licensed traders*, [*sic*] and other similar agencies. We had some bad situations with regard to these *licensed traders*. There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you [*sic*] have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods." (Emphasis added)[16]

[15] A related discussion of the legislative histories and underlying congressional intent of both the Hayden-Cartwright Act (49 Stat. 1521; 4 U.S.C. § 104) and the Buck Act (54 Stat. 1059; 4 U.S.C. §§ 105-110) is contained in the Brief for Respondents in *White Mountain Apache Tribe v. Bracker*, USSC Doc. No. 78-1177, October Term, 1979, pp. 19-30 (argued in tandem with the case herein). *See, in particular*, the discussion (Brief of Respondents, pp. 22-23) of Interior Department Opinion 57 I.D. 129, 138-140, holding that the use of the term "licensed traders" in § 10 of the Hayden-Cartwright Act evinced a congressional intent to include Indian reservations as "United States military or other reserations" within the meaning of the Act. *See also, Appendix, infra.*

However, at the April 23, 1940 hearing, the United States Department of the Interior urged that Indian *reservations* should be excluded from state taxes which would otherwise be applicable under the Buck Act. *See*, letter from E. K. Burlew, Acting Secretary of the Interior, March 13, 1940, Hearing, *supra*, pp. 39-40. The letter outlines the concerns of the Interior Department to preserve the exemption of reservation Indians from the direct levy of state taxes, a goal believed by the Interior Department to be best served through the limitation of the Buck Act by the so-called "LaFollette Amendment". That amendment provided in pertinent part that " . . . this Act [*i.e.*, the Buck Act] shall not affect existing law relating to taxation on Indian reservations."

The final version of 4 U.S.C. § 109, however, rejected the recommendation of the Department of the Interior and instead adopted the position advocated by Representative John Dempsey of New Mexico. *See*, Hearing, *supra*, pp. 18-20. Representative Dempsey argued that the Buck Act should exempt *Indians*, but not Indian *reservations*, his opinion being that:

[16] With regard to Congressman Buck's statement, *see, Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F.Supp. 279, 281 (C.D.Cal. 1969), *affirmed*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), *rehearing denied*, 405 U.S. 1033 (1972), *motion for leave to file second petition for rehearing denied*, 409 U.S. 901 (1972), establishing that the Agua Caliente Indian Reservation exists on a checkerboard pattern in the area of Palm Springs, California. This Court may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California is the Agua Caliente Indian Reservation.

> " . . . [W]e have no desire to tax the Indians. They are exempt from taxation in our state, but we do not believe that because a man establishes a store on Indian lands competing with the store outside, the store inside should be exempt from all taxation, that a store outside should pay."

From the foregoing legislative history, it is apparent that congressional concern was *not* over whether the Buck Act should or should not apply to Indian reservations. Rather, the concern focused on whether the Buck Act should authorize the levying of the direct legal incidence of state sales, use or income taxes upon reservation Indians. The rejection of the LaFollette Amendment in favor of the position advocated by Representative Dempsey conclusively demonstrates that Congress considered Indian reservations to be "federal areas" within the purview of what eventually became 4 U.S.C. § 110(e) and that "licensed traders" *were* intended to be covered by the legislation, at least in those states where the *legal* incidence of the tax in question—sales, use or income—was upon the trader as opposed to any Indian customer of the trader.[17]

Thus, while Congress continued to support an objective of shielding reservations Indians from the direct legal incidence of state taxes, it specifically intended to remove any tax shield for *non*-Indians—including licensed traders—if they were located within a particular type of federal area, *viz.*, an Indian reservation.

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[17] 4 U.S.C. § 110(e) provides:

> "As used in §§ 105-109 of this title—
>
> . . .
>
> (e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State."

At this point, it might well be suggested by CMC or the United States that the foregoing discussion by the Appellee herein constitutes little more than a fanciful embellishment upon the legislative history of the Buck Act, a strained interpretation pursued only in an attempt to avoid the purportedly controlling effect of the *Warren* decision, particularly footnote 18 thereof. Such a suggestion would be unsupportable.

The foregoing tracing of the legislative history of the Buck Act, supporting the conclusion that Congress intended that an Indian reservation be a "federal area" within the meaning of 4 U.S.C. §§ 105-110, did *not* originate with the Appellee herein: it orginated in Rosalind McClanahan's Response to the State's Motion to Dismiss her complaint and action in the Superior Court action in Arizona.[18] The Arizona Court of Appeals' decision in the case (*i.e., McClanahan v. Arizona State Tax Commission*, 114 Ariz. 452, 484 P.2d 221 (1971)), neither cited nor relied upon the Buck Act in reaching its conclusion that the Arizona income tax did apply.

However, on the appeal of the State court decision to this Court, not fewer than eight separate briefs and/or memoranda were filed by the Appellant parties and various supporting amici curiae urging the uniform position that the Buck Act was either specifically, implicitly or impliedly

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[18] *See* Abstract of Record, *Rosalind McClanahan v. State Tax Commission of Arizona*, Arizona Court of Appeals, Division 1, Cause No. 1 CA-CIV 1316, pp. 18-19.

applicable to Indian reservations.[19] The foregoing facts, the Appellee would respectfully submit, clearly demonstrate that, insofar as the Buck Act is concerned, an Indian reservation is a "federal area" within the meaning of 4 U.S.C. § 110(e). The Appellee agrees with the abstract contention that there is no specific congressional intent expressed in the Buck Act to permit the direct application of state taxes to reservation Indians. There is, however, a clear expression of intent by Congress to extend the Buck Act to a particular species of federal area, *viz.*, Indian reservations, and a particular species of merchant residing thereon, licensed Indian traders in situations where the legal incidence of the state tax—as opposed to its contractually "shifted" economic burden—is confined by state law to a non-Indian.

The Appellee would respectfully submit that unless CMC, and/or the United States as amicus curiae can fashion a suitable explanation for the apparent inconsistency between the *McClanahan* decision and footnote 18 in *Warren*, the conclusion is strongly suggested that the

[19] These briefs were filed in the *McClanahan* case, USSC Doc. No. 71-834, October Term, 1971: (1) Appellant's Supplemental Brief in Opposition to Appellee's Motion to Dismiss or Affirm; (2) Brief for Appellant; (3) Reply Brief for Appellant; (4) Memorandum for the United States as Amicus Curiae; (5) Brief for the United States as Amicus Curiae; (6) Brief of the Navajo Tribe of Indians, as Amicus Curiae, in Support of Jurisdictional Statement; (7) Brief of Montana Inter-Tribal Policy Board as Amicus Curiae; (8) Brief for Amicus Curiae, National Congress of American Indians in Support of Appellant. In this regard, compare the similar although not identical position adopted by the United States as amicus curiae in *Kahn v. Arizona State Tax Commission*, 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed* (want of substantial federal question), 411 U.S. 941 (1973) (Brennan, Douglas, J.J., dissenting with opinion, 411 U.S. at 941-944), Memorandum for United States as Amicus Curiae, USSC Doc. No. 71-1263, October Term, 1972. p. 5.

The position of the Indian in *McClanahan* is perhaps best summarized in her Reply Brief, item (3), *supra*, p. 17 thereof:

> "... [T]he Buck Act did intend to deal with taxing jurisdiction on Indian reservations, and it specifically exempted Indians from state income tax."

McClanahan decision, rendered some eight years following *Warren*, has modified the rationale supporting the conclusions reached in footnote 18 of *Warren* and, accordingly, necessitates a re-examination of the question.

(2)

The Authorities in Footnote 18 of *WARREN* Were Premised Upon Mistakes of Fact and Law.

An explanation for the disparity between the rationale of *McClanahan* and footnote 18 in *Warren* may be found in a closer examination of the briefs and records in the two cases. To begin with, the State of Arizona argued in *Warren* that the legislative history of the Buck Act evinced a congressional objective to apply it to Indian reservations.[20] The taxpayer, Warren Trading Post Co., replied that, based upon the New Mexico Supreme Court decision in *Your Food Stores Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961),[21] Indian reservations were not "federal areas" and thus, the Buck Act was inapplicable.

However, an examination of the briefs and decision in *Your Food Stores*[22] will reveal that the dispositive issue was whether or not the Village of Espanola could annex a portion of an Indian reservation. If the annexation were valid, so conceded Your Food Stores, Inc., it would be subject to a Village of Espanola municipal sales tax; but if the village's annexation were invalid, no jurisdiction to impose the tax would exist.[23]

[20] *See*, Brief for the Appellees, *Warren*, USSC Doc. No. 115, October Term, 1964, pp. 16-19.

[21] *Cert. denied*, 268 U.S. 915 (1961).

[22] The briefs are on file at the University of New Mexico (Law School) Records Center, Box 102, Locator No. K-055.

[23] Appellant Your Food Store's Opening Brief, N.M.Sup.Ct. Doc. No. 6716, p. 8.

However, after quoting the tax impositional language of 4 U.S.C. § 105(a) and the definition of "federal area" in 4 U.S.C. § 110(e),[24] the New Mexico opinion misparaphrased the definition and arrived at the conclusion that, under 4 U.S.C. § 110(e), the Indian reservation did not constitute lands or premises held or acquired by "... *or* ..." (4 U.S.C. § 110(e), emphasis added) for the use of the United States.[25]

In *Warren*, however, the taxpayer recognized the disjunctive nature of the definition of "federal area" in 4 U.S.C. § 110(e).[26] In questioning whether Indian reservations were "... lands ... held or acquired by ... the United States ..." within 4 U.S.C. § 110(e), Warren Trading Post Company acknowledged that, while in some contexts, Indian reservations are considered to be held by the United States in trust for the Indians, in other contexts the lands may be considered as being held or owned not by the United States, but by the tribes themselves, citing in support of that assertion a 162-page segment of *Federal Indian Law*, United States Department of Interior (1958), pp. 583-745.[27]

In keeping with generalized notions of the primacy of Indian self-government vis à vis *internal* tribal relations, the discussion in that segment recognizes quasi-ownership interests of the Indians in the lands they occupy. *See, e.g., Federal Indian Law* (1958), pp. 583-584; 591-592. However, where external influences (*e.g.*, state laws) touch the lands, the discussion is dramatically shifted toward treatment of the lands as being owned not by the Indians, but by the United States.

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[24] *See*, 361 P.2d at 955.

[25] Id. at 955-956. The Santa Clara Pueblo lands were originally acquired by the Indians under a grant from a prior sovereignty, the King of Spain. *See*, 361 P.2d at 951-952.

[26] *See*, Appellant's Reply Brief, *Warren, supra*, USSC Doc. No. 115, October Term, 1964, p. 2.

[27] Id. at 2-3, n.2.

For example, the discussion states:

> "Land acquired by the United States in trust for an Indian tribe has been held to be immune from State zoning regulations, which, in terms, do not apply to lands 'belonging to and occupied by the United States'." [28]

Furthermore, with respect to reservations such as the Navajo Indian Reservation, the United States Attorney General, relying upon this Court's decisions in *Spalding v. Chandler*, 160 U.S. 394 (1896) and *In re Wilson*, 140 U.S. 575 (1891), held in a "... carefully documented opinion ..." that as to such reservations, the Indians enjoyed a right of occupancy but

> "... the United States has the title in fee ...
>
> "... [T]he Indian right of occupancy is as sacred as the fee title of the sovereign." [29]

Accordingly, the question of whether or not Indian reservations are federal areas for purposes of the Buck Act and 4 U.S.C. § 110(e) was not as easily solved as the Warren Trading Post Company suggested. On the contrary, if any general conclusion is to be drawn from the foregoing facts, it is this: *Your Food Stores* is not dispositive of the question.

With respect to that portion of footnote 18 in *Warren* that refers to Interior Department opinion 58 I.D. 562, it is the State of Arizona's position that Solicitor Harper assumed that the *uniform* rule with respect to state "sales" taxes was that while they might be initially levied upon the vendor, they were required by state law to be collected from the vendee, thereby making the tax a vendee liability.

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[28] *Federal Indian Law* (1958), p. 588, citing memo Sol. I.D. October 5, 1936, 58 I.D. 52. *Compare* with the language of 4 U.S.C. § 110(e).

[29] Id. at 614-615.

That he would erroneously so conclude in the factual context of 58 I.D. 562 is understandable: the question presented therein was whether or not the Superintendent of the Taholah Indian Agency in Washington was properly inserting the words "State sales tax exempt" into purchase orders for purchases for Indians paid for from individual Indians' restricted accounts.[30]

After prefacing his remarks by reference to 57 I.D. 124,[31] he opined that the conclusions of 57 I.D. 124 — with the exception of part 2(b) thereof[32] — remained valid and that on-reservation sales to Indians under the jurisdiction of the Taholah Indian Agency were exempt from the state sales tax.

The fact of the matter is that, in 1943 (as well as today[33]), the Washington sales tax was a true "sales" tax having as its taxable event the actual title/possession transfer (rather than, as in Arizona, the exercise of the privilege of engaging in business) and having its legal incidence upon the vendee rather than the vendor.[34]

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[30] 58 I.D. at 562.

[31] 57 I.D. 124 held that neither the Arizona transaction privilege tax nor the Arizona luxury tax could be applied to sales made by federally-licensed Indian traders to Indians on Indian reservations.

[32] Part 2(b) of 57 I.D. 124 was specifically overruled in 58 I.D. 562.

[33] *See*, Rev. Code Wash. §§ 82.08.020, 82.08.050 (1979); *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1371 (E.D.Wash. 1978), *appeal pending* U.S. Supreme Court, October Term, 1978, USSC Doc. No. 78-630.

[34] *See*, Rem. Rev. Stat. § 8370-21 (1941); *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935); *Kaeser v. City of Everett*, 47 Wash. 2d 666, 289 P.2d 343 (1955).

Moreover, in 57 I.D. 124, First Assistant Solicitor Kirgis viewed both the Arizona transaction privilege tax act,[35] and the Arizona luxury tax act,[36] there under examination as creating vendee-liability taxes: his observation (57 I.D. at 125) that "... both acts contemplate that the amount of the tax shall be added to the price paid by the consumer ..." was wrong. There was no requirement whatsoever under either tax act as they existed on May 8, 1940 that either tax be collected from or "shifted" to the customer vendee by the vendor.[37]

The additional observation (57 I.D. at 124) that, as to the transaction privilege tax, provision was made by the law for the use of tokens by purchasers to reimburse the dealers for the tax applicable to any sale, is similarly erroneous if intended to show that such provision created a vendee-liability situation. This error is understandable in view of the fact that the Supreme Court of Arizona had not yet ruled in *State Tax Commission v. Quebedeaux Chevrolet*, 71 Ariz. 280, 226 P.2d 549 (1951), wherein the same contention (*i.e.*, that the token provision effected a basic change in the vendor-liability nature of the tax) was rejected. The true purpose of the token provision was to facilitate the making of "change" between the vendor and the vendee for the contractually assumed "cost" of the tax upon transactions involving small or fractional dollar sales. Since the tokens had a "face value" of one mill, they could be used to make "change" where such amounted to fractions of the lowest value coin at that time, the penny. In 1940, people had a much keener interest in the value of a penny. In any

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[35] *See*, Arizona Laws 1935, Ch. 77 (now Ariz. Rev. Stats. §§ 42-1301 *et seq.*).

[36] *See*, Arizona Laws 1935, Ch. 78 (now Ariz. Rev. Stats. §§ 42-1201 *et seq.*).

[37] By Ariz. Laws, 1943, Ch. 84, § 1, the luxury tax act was amended to provide for the first time for mandatory addition to the sales price and collection of the luxury tax from the customer as to purchases of vinous, malt and spirituous liquors. No such amendment has ever been made to the Arizona transaction privilege tax.

event, the law was repealed in 1954[38] and any argument that might otherwise have been made, despite *Quebedeaux*, that the tax was a vendee-liability tax, becomes even more untenable.

With regard to that portion of the opinion in 58 I.D. 562 that the legality of state taxes on sales to Indians was to be determined "... not by but independently of ..." the Buck Act (58 I.D. at 563), the State of Arizona would respectfully submit that this makes sense only if there is a valid underlying understanding of the legislative history of the Buck Act and a correct analysis of the nature and provisions of the tax laws being scrutinized. To the extent that these criteria are not met, the continuing validity of the conclusion is drawn into question.

Thus, and by way of summary, the State of Arizona is fully aware of the fact that this Court—rather than counsel for parties and/or amici curiae appearing before the Court, legislators or solicitors and assistant solicitors for the Interior Department—is the final arbiter of the question as to the applicability or inapplicability of the Buck Act to Indian reservations. The State of Arizona does not suggest otherwise.

However, the objective of the foregoing discussion is to present for examination what appear to be several inconsistencies and/or erroneous assumptions of fact and law in the cases, opinions and legislative histories of the statutes surrounding both the Hayden-Cartwright Act and the Buck Act. This is done not for the purpose of contending that the examination will produce a final, dispositive determination as to the applicability of the Buck Act to Indian reservations.

Rather, it is undertaken for the purpose of suggesting that, due to what appear to be a variety of erroneous factual and legal assumptions in *Your Food Stores* in the two Interior Department Decisions cited at footnotes 15 and 16

[38] *See*, Ariz. Laws 1954, Ch. 136, § 14.

in *Warren* (57 I.D. 124 and 58 I.D. 562) and in view of the legislative history of the Buck Act, contrary to the finding in footnote 18 in *Warren*, it may well be that Congress did, after all, intend for the Buck Act to apply to Indian reservations, *not* as a general matter, but rather on a limited basis, *viz.*:

> 1. Where the legal incidence of a state tax otherwise permissible under 4 U.S.C. §§ 105 or 106 either initially falls by mandate of state law upon an Indian or is required by state law to be "shifted" from a non-Indian to an Indian, it is impermissible;
>
> 2. Where the legal incidence of a state tax otherwise permissible under 4 U.S.C. §§ 105 or 106 falls and remains by mandate of state law upon a non-Indian, it is permissible.

In this way, the State would submit, the legislative intent underlying the Buck Act, and the Hayden-Cartwright Act, as well as the rationale of the decisions in *McClanahan*, *Moe*, and *Bryan*, will be best served.

III
THERE IS NO INFRINGEMENT OF ANY RIGHT OF INDIAN SELF-GOVERNMENT HEREIN.

Although neither CMC nor the United States as amicus curiae specifically urge the point, it is the Appellee's position that, even if the specific argument were so made, the Arizona transaction privilege tax as imposed upon CMC results in no infringement of any right of tribal self-government under the principles espoused in *Williams v. Lee*, 358 U.S. 217 (1959). While this particular issue is discussed in much greater detail in the case argued in tandem with the case *sub judice*,[39] suffice it to say for purposes of the present dispute that numerous decisions of this Court as well as inferior federal and state courts establish that, upon facts such as these, the imposition of a state tax upon the non-Indian who has dealings with reservation Indians

[39] *I.e.*, *White Mountain Apache Tribe v. Bracker*, USSC Doc. No. 78-1177, October Term, 1979, pp. 13-18.

does not, *per se*, result in an infringement of any right of tribal self-government.[40]

IV
CONSTITUTIONAL PREEMPTION AS ADVOCATED BY THE UNITED STATES HEREIN IS INAPPROPRIATE.

Although the taxpayer, CMC, makes no mention of the principle, the United States as amicus curiae has raised a brand new issue insofar as the present dispute is concerned. That issue involves the assertion that, without regard to the federal Indian traders statutes or the regulations implementing such statutes, Article 1, Sec. 8, Clause 3, the Commerce Clause, of its own force and effect, preempts the application of the state laws here in question. The basis of the argument is apparently that, because of the purported overriding concern of the United States in matters of Indian affairs, the United States Constitution, without the aid of congressional action, may operate to preempt the transaction privilege tax as applied to Central Machinery Company's business activities.

The United States contends in its Amicus Curiae Brief, p. 12, that:

[40] *See, e.g.*, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-483 (1976); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1255-1256 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186-1187 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), *rehearing denied* 405 U.S. 1033 (1972), *motion for leave to file second petition for rehearing denied*, 409 U.S. 901 (1972); *Kahn v. Arizona State Tax Commission*, 16 Ariz.App. 17, 18-21, 490 P.2d 846, 847-850 (1971), *appeal dismissed* (want of substantial federal question) 411 U.S. 941 (1973) (Brennan, Douglas, JJ., dissenting with opinion, 411 U.S. at 941-944); *Makah Indian Tribe v. Tax Commission*, 72 Wash.2d 613, 615-617, 434 P.2d 580 581-582 (1967), *appeal dismissed* (want of substantial federal question) 393 U.S. 8 (1968); *Department of Revenue v. Hane Construction Company, Inc.*, 115 Ariz. 243, 564 P.2d 932 (Ct. App. 1977).

> "... the specific history of the Indian Commerce Clause itself confirms its purpose to nationalize white-Indian relations and *wholly to exclude state authority to regulate that intercourse.*" (Emphasis added)

This contention, quite simply, is enigmatic: if such, indeed, were the law, then this Court would be forced to overrule its decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). If the United States' argument were correct, the Montana "pre-collection" requirement (*see, Moe*, 425 U.S. at 482) would have been absolutely impermissible. The mere fact that the Indian, Joseph Wheeler, was a *vendor* of the cigarettes there in question as opposed to a *vendee* of the same, does not alter the fact that, under the United States' "constitutional preemption" argument, this Court could not have upheld the imposition of the Montana taxes with respect to Mr. Wheeler's sales to non-Indians. The fact of the matter is that precisely the opposite ruling was handed down by this Court in its unanimous opinion.

It therefore is the Appellee's position that, assuming, *arguendo*, that the "constitutional preemption" argument is properly before this Court, (*see*, n.4, *supra*), the *Moe* decision establishes, by its own force and without reference to further cases, the error of the United States' argument.

CONCLUSION

For all of the foregoing reasons, the judgment of the Arizona Supreme Court herein should be affirmed.

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APPENDIX

4 U.S.C. § 104. Tax on motor fuel sold on military or other reservation[;] reports to state taxing authority.

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

4 U.S.C. § 105. State, and so forth, taxation affecting federal areas; sales or use tax

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any

Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

4 U.S.C. § 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

4 U.S.C. § 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

4 U.S.C. § 110. Same; definitions

As used in sections 105-109 of this title—

. . .

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1604

CENTRAL MACHINERY COMPANY, *Appellant,*

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, *Appellee.*

On Appeal from the Supreme Court of Arizona

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January 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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On Appeal from the Supreme Court of Arizona

APPELLANT'S REPLY BRIEF

ARGUMENT

A. The Label Arizona Attaches to Its Tax Is Immaterial.

Arizona begins its brief with an extensive discussion of the label to be affixed to its tax, contending that it is a "privilege" tax rather than a "sales" tax. We have discussed this question in our opening brief (at 15-16) but will add one point. The Court has repeatedly held that the title given a tax is not determinative of its validity. *E.g., Complete Auto Transit* v. *Brady,* 430 U.S. 274 (1977). Rather, one looks to its actual terms of imposition. The Arizona tax in question is measured by sales, a fact independent of the name the State chooses to call it.

Historically, state "privilege" taxes applied to interstate commerce were *per se* invalid under the Commerce

Clause. *See Complete Auto Transit* v. *Brady, supra.* Thus if independent significance is to be restored to the label "privilege tax," Arizona's tax is invalid under the Commerce Clause as a tax on the privilege of trading with the Indian tribes. U.S. Const. art. I, § 8, cl. 3.

B. Arizona's Arguments That *Warren* Has Been Implicitly Overruled Were Not Raised Below and Are Barred by Collateral Estoppel.

Arizona devotes the largest part of its brief to arguments that the *Warren* decision has been implicitly overruled or eclipsed by subsequent decisions of this Court. Ariz.Br. 12-29. The State first contends that *Warren* misinterpreted "general principles of federal preemption." Ariz.Br. 12-14. It is then contended that the Court's decision in *McClanahan* v. *Arizona Tax Comm'n,* 411 U.S. 164 (1973), "has modified the rational" of *Warren.* Ariz.Br. 23. These arguments should be rejected, because they were not made below and because Arizona is precluded by collateral estoppel from asserting them.

1. The argument that *Warren* has been overruled or eclipsed by subsequent decisions of this Court was never raised below nor considered by the courts below. In the words of Arizona's brief, it is "a brand new issue." Ariz.Br. 30. This Court has frequently held that it "will not ordinarily consider" such issues. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n. 2 (1970) and cases cited.

2. Arizona was a party to *Warren,* and the issues it seeks to raise now were actually litigated in that case. *See* jurisdictional statement and briefs in *Warren,* No. 115, Oct. Term, 1964. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States,* 440 U.S. 147, 153 (1979). Although Central Machinery Co. was not a party to *Warren,* a nonparty to the prior case can properly invoke collateral estoppel so long as the party against whom estoppel is asserted had a full and fair opportunity to be heard. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979); *Blonder-Tongue Laboratories* v. *University of Illinois Foundation,* 402 U.S. 313 (1971). The question expressly and definitely presented in this action is the same as that definitely and actually litigated and adjudged adversely to the State in *Warren.* This question cannot be relitigated now.

C. Arizona's Arguments That *Warren* Has Been Implicitly Overruled Are without Merit.

1. *Warren* has not been eclipsed by Supremacy Clause decisions in other areas of law.

Arizona argues that the Court in *Warren* cited *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), and that *Rice* has been eclipsed or implicitly overruled by the decisions in *DeCanas* v. *Bica,* 424 U.S. 351 (1976) and *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). Ariz.Br. 12-14. It seems unlikely that this was the intent of the Justices who joined in the majority opinions in these cases, because both opinions cited approvingly to *Rice.* 424 U.S. at 357; 373 U.S. at 146.[1]

Rice aside, Arizona's argument is based on a faulty premise about Supremacy Clause jurisprudence. This Court's interpretations of the purposes of Congress in Supremacy Clause cases have been strongly influenced by the subject matter of the case under review. In *Florida Lime,* the Court emphasized that, "[T]he maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of State superin-

[1] *Rice* has since been favorably cited in a number of decisions, *e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

tendence." 373 U.S. at 144. In other words, in Supremacy Clause cases an important factor is whether the subject matter is traditionally federal, traditionally state, or the case involves a clash of both. *See Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 272 (1977); *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

In recent years the federal government has more often entered areas traditionally left to the States than *vice versa,* and the Court has required a rather specific intent of Congress to preempt state law in such areas, as was the case in *Florida Lime, supra.* Where the area in question is traditionally federal, the Court has generally attributed broader scope to the congressional undertaking. *E.g., Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956) (sedition); *Hines* v. *Davidowitz,* 312 U.S. 52 (1941) (aliens). *See* L. Tribe, *American Constitutional Law* 385-86 (Foundation 1978).

The government of Indian country and trade with Indians and tribes therein have long been areas of federal domination and of tribal independence under federal supervision. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *McClanahan* v. *Arizona Tax Comm'n, supra,* 411 U.S. at 168, quoting *Rice* v. *Olson,* 324 U.S. 786, 789 (1945). *See also United States* v. *Kagama,* 118 U.S. 375, 384 (1886); *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 757 (1867); *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832); F. Cohen, *Handbook of Federal Indian Law* 116 (U.S. Dept. of Interior 1942).

For these reasons the Court has accorded a broad reach to the scope of federal Indian statutes and treaties in Supremacy Clause cases. *See Washington* v. *Fishing Vessel Ass'n,* _____ U.S. _____, 61 L.Ed.2d 823 (1979); *United States* v. *John,* 437 U.S. 634 (1978); *United States*

v. *Mazurie,* 419 U.S. 544 (1975); *Kennerly* v. *District Court,* 400 U.S. 423 (1971); *Williams* v. *Lee,* 358 U.S. 217 (1959).[2] The Court's decision in *Warren* was soundly based on these traditions. There is nothing in the Court's recent decisions from other legal fields to support the abrupt change in course asserted by Arizona here.

2. *Warren* is consistent with *McClanahan.*

Arizona argues that *Warren* was implicitly overruled or eclipsed by the Court's decision in *McClanahan* v. *Arizona Tax Comm'n, supra.* Ariz.Br. 14-29. The notion that *Warren* is inconsistent with *McClanahan* is again an unlikely intent of the Justices who joined in the Court's later opinion, since *Warren* was cited favorably four times, and specific reliance was placed on it. 411 U.S. at 170, 175, 177, 180.[3]

Arizona relies on the *McClanahan* opinion's discussion of the Buck Act, 4 U.S.C. 105-110. But *Warren* was favorably cited in that part of the opinion. 411 U.S. at 177.

3. The *Warren* construction of the Buck Act is correct.

McClanahan aside, the argument that the *Warren* Court misinterpreted the Buck Act has no merit. In the

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[2] Related judicial rules of construction have supported broad construction of federal Indian statutes and treaties. Consensual agreements are to be interpreted as the Indians understood them. United States v. Winans, 198 U.S. 371, 380 (1905). Indian statutes are to be liberally construed and doubts resolved in favor of the Indians. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). The Court does not imply a purpose of Congress to diminish tribal self-government absent a clear showing that Congress so intended. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Court applied these rules to deny state taxing authority under an uncertain statute in Bryan v. Itasca County, 426 U.S. 373 (1976).

[3] *Warren* has been favorably cited a number of times since, *e.g.,* United States v. Wheeler, 435 U.S. 313, 324 (1978).

Warren litigation, Arizona argued for the same construction of the Buck Act as it asserts here, relying on both its language and legislative history. *Warren*, No. 115, Oct. Term, 1964, Brief for the Appellee 16-19. This Court rejected the argument on two alternative grounds: (1) the Buck Act was not intended to apply to Indian reservations; (2) even assuming it was, "nothing whatever in that Act suggests to us that Congress meant to give States new power to tax reservation Indian traders." 380 U.S. 685, 691 n. 18.[4]

These grounds are actually very similar. By 1940 it was well settled that non-Indians in Indian country were subject to state and territorial taxes in matters not affecting Indians.[5] Thus to construe the Act as inapplicable to Indian reservations or as not affecting preexisting Indian tax immunities is practically the same thing.

a. The Buck Act did not intend to authorize state taxation of commerce with reservation Indians.

The legislative history of the Buck Act shows that Congress meant to leave state taxation on Indian reservations as it was before the Act—neither to take from the Indians any immunity or measure of tribal self-government, nor to grant any new immunities to non-Indian commerce. The original bill which led to the Act made no reference to Indians. H.R. 6687, 76th Cong., 1st Sess., introduced June 6, 1939. 84 Cong. Rec. 6737. There is no indication

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[4] Both grounds had been briefed by appellant Warren Trading Post Co., *Warren,* No. 115, Oct. Term, 1964, Appellant's Reply Brief *passim.*

[5] *See* Silas Mason Co. v. State Tax Comm'n, 302 U.S. 186, 209 (1937); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906); Thomas v. Gay, 169 U.S. 264 (1898); Utah & N.R. Co. v. Fisher, 116 U.S. 28 (1885).

that commerce with Indians had any connection with the bill's purposes.

It is true that the bill's possible relation to Indian reservations was discussed in Congress. The Interior Department raised the issue out of concern that the proposed bill might be construed by state authorities to infringe on Indian rights, and a specific exemption for Indian reservations was then proposed. 84 Cong. Rec. 10685-86, 10907 (1939).

At a Senate subcommittee hearing the following year, Congressman Dempsey of New Mexico testified expressing his concern that a specific exception for Indian reservations might by negative implication create immunity for non-Indian businesses from all state taxes, and Arizona relies heavily on his view. Ariz.Br. 19-20. But Arizona's brief quotes the Congressman selectively. In the same statement as that quoted by the State, he also said:

> We have no objection whatsoever to prohibiting the sales taxes applying to Indians, but we cannot conceive of any reason why a man should move a store onto an Indian reservation to avoid or stop collection by the State of a tax when the goods are sold not to Indians but to tourists and people living in the vicinity of the reservation

Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. 19 (1940). This Congressman advocated continuing the exemption of commerce with Indians but making sure that commerce between non-Indians on Indian reservations was taxed. *Id.* at 20.[6]

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[6] Arizona also quotes a statement by Congressman Buck referring to the City of Palm Springs, California, and asks the Court to find by judicial notice that the Congressman was referring to an Indian reservation. Ariz.Br. 18-19. We agree that a portion of the Agua Caliente Indian Reservation is within Palm Springs. We don't know whether

The published legislative history does not directly explain the addition to the bill of what is now 4 U.S.C. 109.[7] But there are clues in the Hearing Report and Congressional Record. As discussed above, Rep. Dempsey of New Mexico advocated that sales to Indians remain nontaxable but that sales to non-Indians be taxed.[8] Later an Assistant Solicitor from the Interior Department reminded the Senators of the longstanding rule that commerce within Indian country but not involving Indians is subject to state and territorial taxes. Hearing, *supra*, at 38; *see* note 5 *supra*. He said the Department applied this rule to non-Indian licensed traders selling to non-Indian customers. Hearing, *supra*, at 38. On this basis he asked the Senate Subcommittee to leave state taxation on Indian reservations as it was before the Act. *Id.*

In *Warren*, the Court held that Interior got what it wanted. 380 U.S. at 691 n. 18. As shown above, this is consistent with the position of Rep. Dempsey of New Mexico, and Arizona says his view is reflected in the statute. Ariz.Br. 19-20. Further support is found in the description of the final bill to the full Senate by Senator George, Chairman of the Subcommittee which added 4 U.S.C. 109. He said:

> [The bill] merely permits the States to collect a sales tax on sales that are made within a reservation which lies within the extraterritorial jurisdiction of the State. *It is not intended to confer any power upon the State,* but simply to relieve the situation that now prevents collection. [Emphasis added.]

86 Cong. Rec. 7012 (May 28, 1940).

That Interior was satisfied that the final statute achieved its aim to protect existing Indian immunities is inferable from other facts of record. At the close of the April 1940 hearing, the Senate Subcommittee (Senators George, Brown and LaFollette) suggested to Rep. Buck that a conference be arranged with the Interior, Navy and War Departments to work out needed amendments. Hearing, *supra*, at 40; *see also* S.Rep. No. 1625, 76th Cong., 3d Sess. 1 (1940). The amendment which became 4 U.S.C. 109 was drafted at that time. The record does not indicate definitely whether such a conference occurred and generated the amendment, but Interior did not thereafter oppose the bill. It is reasonable to infer that the Department viewed the amended bill as consistent with its objective.

A number of rules of construction also support the Court's conclusion in *Warren*. The special rules concerning federal Indian laws and treaties have already been mentioned. Note 2 *supra*. In *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), the Court interpreted a seemingly broad but ambiguous grant to the States of civil jurisdiction over Indian country not to abolish any Indian tax immunities. The Court said:

> "[S]tatutes passed for the benefit of dependent Indian tribes. . .are to be liberally construed, doubtful

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Congressman Buck was referring to it, but even if he were his statement is consistent with the Court's interpretation of the Buck Act in *Warren*. A 1974 report listed the Indian population on or near the reservation as 74 persons. Federal and State Indian Reservations and Indian Trust Areas 78 (U.S. Dept. of Commerce 1974). By 1940 Palm Springs was already a sizeable city with a large tourist trade. Common sense indicates that Congressman Buck was concerned about sales to non-Indians, not to the very small (and in 1940 still impoverished) Indian population.

[7] 4 U.S.C. 109 was added by the Senate Subcommittee following the April 1940 hearing cited above. The only committee report on the amended bill was S. Rep. No. 1625, 76th Cong., 3d Sess. (May 16, 1940). It merely restated without explanation the terms of the proposed amendment which became 4 U.S.C. 109. No House committee report was made on the amended bill.

[8] A premise of the Hearing discussion of Indian reservations was that the existing sellers were non-Indians, although Rep. Dempsey did say that sales by Indians to others would be exempt. Hearing, *supra*, at 19.

> expressions being resolved in favor of the Indians." [Citations omitted.] This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. [Citations omitted.] "This is so because. . .Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity . . ." [citation omitted].

426 U.S. at 392. Thus the rights derived from the Indian trading laws and the statute setting aside the Gila River Reservation should not be limited by the uncertain terms of the Buck Act.

In addition, the Court has often held that repeals by implication are not favored, and that where possible a subsequent statute should be reconciled to a prior one. This rule was applied to sustain preexisting Indian rights in *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974) and in *Ex parte Crow Dog*, 109 U.S. 556, 570 (1883). *See also Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In the instant case, Arizona asks the Court to reverse *Warren* and hold that the Buck Act limited preexisting Indian rights under the Indian trading laws and infringed on the economic and tribal self-government purposes of the Gila River Reservation. Such repeals should not be found absent a clear and convincing showing that Congress intended them, and Arizona has failed to make such a showing.

Finally, the *Warren* construction has also been the consistent interpretation of the the statute by the Interior Department. Three years after the Act was passed, the Department concluded: "Basic Indian immunities under the law in force prior to the enactment were not disturbed nor were new immunities created." 58 I.D. 562, 563 (1943). The settled interpretation by the agency administering Indian affairs—including commerce with Indians and

tribes—is entitled to "great respect." *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976).[9]

b. The Buck Act does not apply to Indian reservations.

The Buck Act authorizes States to impose sales, use and income taxes in "federal areas." Federal areas are defined in 4 U.S.C. 110(e) as "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States. . . ." This language may fit federal agency lands within Indian reservations, such as for Bureau of Indian Affairs and Indian Health Service facilities. But it requires more than a little stretching to make the statute include the rest of an Indian reservation or other Indian country.

Arizona contends that reservations are lands "held . . .by. . .the United States," albeit in trust for the tribes. Ariz.Br. 24-25. But land ownership in Indian country includes tribal land, individual Indian allotments, and unrestricted land owned by Indians, non-Indians, corporations, States, and the federal government. *See, e.g., Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 477-79 (1976); *United States* v. *Celestine*, 215 U.S. 278, 286 (1909); *United States* v. *Thomas*, 151 U.S. 577 (1894). Individual allotments are both "trust" allotments, with

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[9] Arizona's brief in this case attempts to adopt by reference its argument in the tandem case (White Mountain Apache Tribe v. Bracker, No. 78-1177) concerning the Hayden-Cartwright Act, 4 U.S.C. 104. Ariz.Br. 18 n.15. However, that Act presents distinct questions. Its places of application are different from the Buck Act's definition of federal areas. Early Interior Department interpretations of the two statutes differed. Contrast 57 I.D. 129 (1940) with 58 I.D. 562 (1943). 4 U.S.C. 104 has a distinct legislative history. Even when it was amended at the time the Buck Act was passed, no attempt was made to reconcile the disparate statutory terms. *See* S.Rep. No. 1625, 76th Cong., 3d Sess. 4-5 (1940). Appellant here takes no position on the issues concerning 4 U.S.C. 104 in No. 78-1177.

fee title in the United States in trust for an Indian, and "restricted" allotments, where the Indian owns the fee subject to a restriction against alienation in the United States. *See United States* v. *Ramsey*, 271 U.S. 467, 470 (1926).

Nor does tribal land readily fit the statutory definition. It is usually set aside by a treaty, statute, or executive order, often (as at Gila River) confirming the aboriginal ownership of the tribes. There is normally no deed showing ownership of the fee, beneficial ownership, reversions, and the like.[10] Rather, these relationships are fixed by federal statutes and by principles drawn from international law. *See Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). All tribes are restricted from conveying their lands, regardless of the formal title. *Id.*; 25 U.S.C. 177. The United States has the sole right of preemption upon extinguishment of the Indians' title. *Johnson* v. *M'Intosh, supra*, 8 Wheat. at 592. But the tribal title "is as sacred as the fee simple of the whites." *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835). The United States' residual right is sometimes equated with the fee title held by a common law trustee. *E.g., Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979). But the actual state of tribal title is based on principles unique to federal Indian law, which are analogous to the common law only in certain respects. *See* F. Cohen, *Handbook of Federal Indian Law, supra,* at ch. 15.

Thus, the Buck Act definition of federal areas at best fits only portions of Indian reservations, and this Court has eschewed "checkerboard" applications of Indian jurisdictional laws. *Moe* v. *Confederated Salish & Kootenai Tribes, supra,* 425 U.S. at 478. To include all of Indian country within the Buck Act definition requires substantial bending or distortion of the terms. Arizona, therefore, must show clear congressional intent to have the Act apply. This is especially so because of the rule that Indian rights will not be infringed by ambiguous laws or doubtful constructions of them. *Bryan* v. *Itasca County, supra,* discussed at pages 9-10.

[10] Even when there is, the ownership may formally be in a tribe in fee simple, but statutory restrictions make the title practically the same as other tribal lands. *See* United States v. Sandoval, 231 U.S. 28, 48 (1913).

The legislative history does not support Arizona's contention. As already discussed, there was concern expressed by some western congressmen that non-Indian commerce in Indian country should be subject to state taxes. Page 7, *supra*. But thereafter the Interior Department pointed out to the Senators that existing law allowed such taxes and advocated retention of existing Indian country rules. The Department may have assisted in drafting the amended bill and in any case did not oppose it. Pages 8-9, *supra*. It is therefore possible that the Senate Subcommittee accepted Interior's position, and 4 U.S.C. 109 was added out of an abundance of caution to protect Indian immunities and because the definition of federal areas might include portions of Indian reservations, such as federal agency lands.

A further source of doubt about inclusion of Indian country arises from the frequent equation of "federal areas" with places under exclusive federal territorial jurisdiction, in statements by Rep. Buck and others. Hearing, *supra*, at 3, 4, 5, 17, 32, 39. Senator George, whose Subcommittee redrafted the bill to its final form, told the full Senate that the bill applied to reservations which lie "within the extra territorial jurisdiction of the State." 86 Cong. Rec. 7012 (1940), quoted more fully at page 9, *supra*. As the Interior Department had told the Senators, Indian reservations are not such places. Hearing, *supra,* at 38.

One cannot resolve the question definitely on the meager record left by the 76th Congress. This uncertainty is far short of the clear congressional purpose needed to authorize state taxation of commerce with reservation Indians. *Bryan* v. *Itasca County, supra.* Therefore the Court's conclusion in *Warren* that the Buck Act does not apply to Indian reservations is correct.

4. The Buck Act does not validate state privilege taxes.

Arizona strenuously contends that its tax is (and always has been) a privilege tax and not a sales tax. Ariz.Br. 3-7. But the Buck Act only authorizes imposition of state sales, use and income taxes. 4 U.S.C. 105-106. The statute nowhere authorizes a privilege tax. Thus by the terms of Arizona's own argument, the Buck Act has no application to the tax at issue.

CONCLUSION

The decision of the court below should be reversed.

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January 1980

Supreme Court, U. S.
FILED
NOV 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-1604

In the Supreme Court of the United States

OCTOBER TERM, 1979

CENTRAL MACHINERY COMPANY, APPELLANT

v.

ARIZONA STATE TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the Supreme Court of Arizona (J.S. App. 7a-14a) is reported at 589 P.2d 426. The opinion of the Superior Court of Arizona (J.S. App. 4a-6a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on December 4, 1978. A petition for rehearing was denied on January 23, 1979 (Pet. App. 14a). Appellant's jurisdictional statement was filed

on April 19, 1979, and probable jurisdiction was noted on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether a State may tax the on-reservation sale of farm machinery to an Indian tribe, on the ground that the seller is not licensed as a permanent "Indian trader" residing on the reservation.

STATEMENT

The appellant, Central Machinery Co., is a corporation chartered by, and doing business in, the State of Arizona.[1] In 1973 appellant's salesman entered into a contract to sell eleven John Deere tractors to Gila River Farms, an enterprise of the Gila River Indian tribe. The contract was executed on the Gila River Reservation and the tractors were delivered to Gila River Farms on the reservation. The total price, including the tax in dispute, was $100,137.26. Gila River Farms paid for the tractors by a check that was delivered to the appellant on the reservation.

The Gila River Indian tribe is a federally recognized tribe that is governed by a constitution adopted pursuant to 25 U.S.C. 476. It occupies a reservation in Arizona established under the Act of February 28, 1859, ch. 66, 11 Stat. 388, 401. Gila River Farms is an enterprise established by the tribal council, apparently for the purpose of farming tribally-owned lands on the reservation. Neither Gila River Farms nor the Gila River tribe is a party to this action.[2]

Appellee State of Arizona imposes a transaction privilege tax on the privilege of doing business in the State. The tax is computed as a percentage of the gross receipts of the taxable entity, which in this case is the Central Machinery Co. The transaction tax is assessed against the seller of goods, rather than the purchaser. In the case of the present transaction, the tax was itemized on the bill of sale as an element of the total purchase price paid to appellant by Gila River Farms. The amount of the tax, as measured by the gross receipts from the sale of the tractors, is stipulated to be $2,916.62. This amount was paid to the State under protest by the appellant, who then filed this action for a refund. It is stipulated that, if appellant is successful in this action, it will refund the $2,916.62 to the tribe.

Appellant is not licensed under 25 U.S.C. 261-264 and 25 C.F.R. Part 251 to engage in trade with Indians on reservations. However, the transaction was approved by the Bureau of Indian Affairs.

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[1] The facts recited in this brief have been stipulated by the parties (J.S. App. 7a-8a).

[2] The result in this case should be unaffected by the fact that the sale was made to a tribal enterprise rather than to the tribe itself. In *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 n.3 (1973), this Court stated that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business."

Appellant sued for a refund in the State Superior Court and prevailed (J.S. App. 4a-6a). With one Justice dissenting (J.S. App. 10a-14a), the Arizona Supreme Court reversed (J.S. App. 7a-10a). In its view, *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), was not controlling because "Central Machinery is not an 'Indian trader', although it may on occasions do business with reservation Indians, even to the extent of going on the reservation to solicit business" (J.S. App. 9a).

ARGUMENT

The narrow question presented is whether this case is governed by *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965). The identical transaction privilege tax is involved, and here, as there, that tax is sought to be collected in respect of a sale by a non-Indian company to Indians on their reservation. The relevant difference, according to the State and the majority of the Arizona Supreme Court, is that Central Machinery, unlike Warren Trading Post, does not "reside" on the reservation and has not obtained a permanent "Indian trader's" license. The response made by appellant—and accepted by the Superior Court and by the dissenting Justice of the State Supreme Court—is that the same federal statutes and regulations apply here and that the failure of Central Machinery to obtain a license cannot change the result. In the words of Judge O'Connor (J.S. App. 6a; emphasis in original): "It is the *existence* of the federal laws

and accompanying regulations and not their *enforcement* which pre-empts the State's ability to tax the transaction in question."

We believe that short answer is both correct and sufficient. If we go beyond this simple submission, it is only out of abundance of caution.

A. Statutory Pre-Emption

1. On their face, the Indian Trader statutes, 25 U.S.C. 261-264, apply to the transaction in suit. The sales contract was executed on the reservation, delivery was effected there and payment was made there. In fact and in law, the sale occurred on the reservation. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 42-44 (1940); *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 328-329 (1944). All such sales are within the literal scope of the cited provisions. Indeed, Section 264 makes it an offense, subject to fine and forfeiture, "to introduce goods, or to trade" without a license "in the Indian country, or on any Indian reservation." These words embrace this case, as at least one court of appeals has expressly held. See *United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

The suggestion that only resident and regular traders are subject to the federal statutes is unfounded. Implementing regulations expressly provide for the licensing of "itinerant peddlers," 25 C.F.R. 251.9(b), by definition non-residents. See 25 C.F.R. 252.3(i). To be sure, in practice, no "license" is issued for a single transaction. But that

merely reflects the custom of granting a license for a substantial period of continuous dealing. Obviously, a small Indian tribe will not have occasion to purchase expensive farm machinery with such frequency as to justify a resident licensed dealer. Yet, as one would expect, federal power to approve or disapprove such an important transaction exists, just as it does for the purchase of ordinary staples. See 25 U.S.C. 262, 263. Indeed, here, both the budget of the tribal enterprise providing for the purchase of the farm machinery, and the actual contract of sale, were approved by the Bureau of Indian Affairs.

2. Any doubt as to the reach of the Indian Trader statutes is dispelled if we notice their origin and purpose. They derive, with very little change, from the very earliest Indian Trade and Intercourse Acts, beginning in 1790. Significantly, the language of the first statutes makes it very clear that *all* substantial trade with Indians, wherever conducted, was subjected to federal regulation. Thus, the Act of July 22, 1790, ch. 33, Section 3, 1 Stat. 137, reached anyone who attempted "to trade with the Indian tribes, *or* be found in the Indian country" (emphasis added). See, also, Act of March 1, 1793, ch. 19, Section 3, 1 Stat. 329. The later geographic limitation to "Indian country," see Act of June 30, 1834, ch. 161, Sections 1-7, 4 Stat. 729-730, simply reminds us how quickly, east of the Mississippi, the Indian was confined to his diminished territory, now for the most part defined and set apart by treaty. Henceforth, that would be the only situs of serious Indian trade.

It may well be that the conditions of the time usually required the trader to establish himself for some period within Indian country to develop a profitable business. But, as early as 1834, "introduc[ing] goods" or "trad[ing]" within Indian country without a license were expressly prohibited, quite separately from "resid[ing] in the Indian country as a trader." Section 4, 4 Stat. 729. Nor is there any basis for reading the early statutes as exempting significant transactions by merchants who were not exclusively or primarily Indian traders. On the contrary, it seems clear the primary concern, then as now, was to limit the risk that the Indians would continue to become victims of "fraud and imposition" in commercial intercourse by controlling whoever did substantial trade with the tribes. See H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834). Whatever gave rise to such opportunities was subject to regulation.

From an early day, no permit was required of bona fide travellers merely passing through Indian areas who wished "to purchase, by exchange or otherwise, such articles as may be necessary for [their] subsistence." See Act of March 1, 1973, ch. 19, Section 3, 1 Stat. 329. So, also, it may have been thought impractical to monitor occasional isolated personal transactions, except in specifically prohibited commodities. *E.g.*, Act of June 30, 1834, ch. 161, Sections 7, 20, 4 Stat. 730, 732. The focus was on commercial business. But it is not conceivable that those who wrote the Indian Trader provisions mean to exempt from their regulation a tribal purchase of essen-

tial farm machinery involving more than $100,000, simply because, in changed conditions, the negotiation of such a sale was possible without the "trader" establishing a permanent "post" in Indian country.

No doubt, such a transaction is more familiar today than it was in the early Nineteenth Century. Yet, as *Warren Trading Post* reminds us, there is still reason to "protect Indians against prices deemed unfair or unreasonable." 380 U.S. at 691. Today, moreover, there is an increased threat to Indian autonomy from State taxation, and effective protection of the tribes may more often require shielding them from burdens imposed by their governmental neighbors, rather than the greedy merchant. The exclusive federal control announced by the Indian Trader statutes serves that purpose as well. But, at all events, until Congress repeals them, these provisions should continue to be given "a sweep as broad as [their] language." *United States* v. *Price*, 383 U.S. 787, 801 (1966). Once again, it seems appropriate to paraphrase Mr. Justice Holmes, writing for the Court in *United States* v. *Mosley*, 238 U.S. 383, 388 (1915): "[I]f we cannot interpret the past by the present, we cannot allow the past so far to affect the present as to deprive [the Indians] of the United States of the general protection which on [their] face [the statutes] most reasonably afford[]."

3. If, as we submit, the transaction in suit is governed by the federal Indian Trader statutes, state regulation and taxation is clearly pre-empted. That follows from the provision in 25 U.S.C. 261 that "the sole power and authority to appoint traders to the

Indian tribes" shall reside in the Commissioner of Indian Affairs and the ruling in *Warren Trading Post* that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690 (footnote omitted). It cannot of course matter whether, as a consequence of general administrative practice or a particular default, the statutes have not in fact been enforced in a given instance. If Congress has preempted the field, the State cannot enter it—whether or not its action would actually conflict with the specific directive of a federal official. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

B. Constitutional Pre-Emption

What has been said, we believe, disposes of the case as a matter of statutory pre-emption under *Warren Trading Post*. But the same result follows, in our view, even if the federal Indian Trader statutes were deemed inapplicable here.[3] Our alternative submission is simply that, "*absent* governing Acts of Congress" permitting it (see *Williams* v. *Lee*, 358 U.S. 217, 220 (1959); emphasis added), the Indian Commerce Clause of the Constitution, of its own

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[3] Indeed, the Court has recently suggested that the holding of *Warren Trading Post* did not depend on the Indian Trader statutes. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170 n.6 (1973). The *Warren Trading Post* opinion itself expressly left open the constitutional question presented under the Indian Commerce Clause. 380 U.S. at 686.

force, pre-empts State regulation and taxation of trade with Indians on their reservation, at least in circumstances like those present here.

We appreciate that the doctrine of constitutional pre-emption in respect of State intervention in Indian affairs has been dormant for some years and, in some quarters, is thought to be beyond revival. Pervasive legislation by Congress has largely mooted the issue. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 n.8 (1973). But no provision of the Constitution becomes inoperative merely because it has not recently been called to service. Besides, as it seems to us, the Indian Commerce Clause has necessarily played a role in limiting State action in a number of recent Indian cases—albeit more modest reasons have been invoked.

1. It is hardly debatable, we suppose, that the Indian Commerce Clause—like the Interstate Commerce Clause—inhibits some State interference of its own force, independently of implementing congressional legislation. Sufficient, if extreme, examples are, on the one hand, a State law barring, or imposing a special duty on, the "importation" of Indian products from reservations within the State; or, on the other hand, a prohibition, or increased tax, on sales *to* reservation Indians. Even though they offended no specific provision of federal treaty or statute, such measures obviously must fall on the same ground as their interstate analogs. The real question here is whether the self-executing force of the Indian Commerce Clause reaches beyond discriminatory state legislation. We suggest it does.

2. No more than the Foreign Commerce Clause, the Indian Commerce Clause is not the exact counterpart of the Interstate Commerce Clause. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, No. 77-1378 (Apr. 30, 1979). Indeed, its purpose is, in many respects, very different. From the start, the Indian Commerce Clause was understood to authorize complete and absolute federal regulation of white-Indian relations of a kind and degree then unthinkable—and even now not entirely familiar—in respect of non-Indian commerce between the States. And, as the early Indian Trade and Intercourse Acts made clear, much of that regulation would be prohibitive or restrictive, and exclusive, in character—far from encouraging and facilitating the "free flow of commerce." See, *e.g.*, Act of March 1, 1793, ch. 19, Sections 6, 7, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732; 25 U.S.C. 263. But it was not only the power granted to Congress that was more pervasive and directed to a distinct goal; the Indian Commerce Clause, in its negative implications for State action, has a like scope. Indeed, in our view, the Clause reserved to the national government exclusive authority—absent delegation—to regulate intercourse with the Indian tribes, so long as they maintained their separate organization within their own territory.

That ought not be a surprising conclusion in respect of a matter that was then viewed as akin to foreign relations and one, like immigration, that was seen as primarily calling for restrictive regulation.

Cf. *Hines* v. *Davidowitz*, *supra*. We must remember that those who wrote the Indian Commerce Clause spoke of Indian "nations," with whom it was appropriate to execute treaties. As Chief Justice Marshall explained, that understanding is embodied in the Constitution through the Supremacy Clause which "adopted and sanctioned the previous treaties with the Indian nations." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). So, also, the separateness and quasi-alien character of Indians, even those residing within the boundaries of the States, was emphasized in their exclusion from the population base used to apportion Representatives. Art. I, Sec. 2, cl. 3. See, also, Amend. XIV, Sec. 2. But, as it happens, the specific history of the Indian Commerce Clause itself confirms its purpose to nationalize white-Indian relations and wholly to exclude State authority to regulate that intercourse.

Before the Constitution, there had been much vying between the States and the national Congress over authority to deal with the Indian tribes. The matter was ambiguously compromised in the Articles of Confederation, which, in Article IX, granted Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians," but then exempted Indians who were "members of any of the States" and purported to preserve "the legislative right of any State within its own limits." As Madison wrote in *The Federalist* No. 42, that was an "endeavor to accomplish impossibilities." He construed the new In-

dian Commerce Clause as resolving the dilemma by giving the national government exclusive authority over intercourse with the Indian tribes, whether within the States or elsewhere. *Ibid.* Although it was not always followed in practice, Madison's view, not surprisingly, has generally been accepted as sound constitutional doctrine.

Indeed, during the ensuing century, this Court expressly asserted that "there can be no divided authority" between federal and State governments in Indian affairs. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866). And, after rehearing the history of the Indian Commerce Clause as intentionally altering the scheme of the Articles of Confederation, the Court concluded that "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes." *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). See, also, *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417-418 (1865). Nor do we appreciate that the Court has retreated from that principle in more recent times.

3. No doubt, modern conditions counsel against reading the Indian Commerce Clause too expansively. With very limited exceptions, the negative implications of the Clause should be confined to reservations or other Indian country. Even there, activities which do not directly implicate the Indians are normally subject to State jurisdiction. *E.g.*, *United States* v. *McBratney*, 104 U.S. 621 (1881); *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885). And, of course,

we must respect any congressional decision to transfer or share previously exclusive federal authority with the State, whether by removing the protective reservation boundary, *e.g.*, *DeCoteau* v. *District Court*, 420 U.S. 425 (1975), or by direct cession of jurisdiction, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979).

It may be, moreover, that certain transactions between individual Indians and their non-Indian neighbors are so unrelated to the goals of the Indian Commerce Clause that they can be made subject to modest State laws without offending the rule of exclusive federal regulation. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976). But, absent congressional permission, the Indian Commerce Clause does not tolerate a State burden directly imposed on essential commerce with the tribe itself on its own reservation. That kind of transaction, we submit, remains within exclusive federal control and therefore beyond the State's power to reach.

3. Our submission is consistent with the modern cases recognizing the residual sovereignty of the tribes, including powers of self-government and limited territorial jurisdiction, *e.g.*, *Williams* v. *Lee*, *supra*; *United States* v. *Wheeler*, 435 U.S. 313 (1978), and preserving the personal immunity of reservation Indians from State taxation, *e.g.*, *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). At the end of the day, those prerogatives survive as part of our constitutional arrangement and do not

depend on treaties or statutes confirming them. The historic fact is that, by subscribing to the Constitution, the original States—for themselves and all later admitted States—relinquished their claims to participate in Indian affairs, so long at least as the Indians remained within the territory confirmed to them by federal authority, and until Congress ordained otherwise.

That constitutional agreement governs this case. Here, however, there is no occasion to stray from the text of the Constitution. Both the personal immunity of Indians from State taxation, and the subsisting right of tribal self-government free of State interference, are no doubt reflected in the Indian Commerce Clause. But that provision merely assumes, without defining, the status of the Indian tribes as distinct political communities. The Clause itself does not circumscribe the residual autonomy of tribal governments or specify the scope of the exemption from taxation. Not so here. The Indian Commerce Clause speaks directly to the regulation of trade and intercourse between Indian tribes, within their territory, and their non-Indian neighbors. There is no ambiguity. At the least, we must read the Clause as wholly exempting from State burdens all substantial commerce with the tribes themselves in respect of articles that serve the vital interests of the reservation community.

4. The consequences of our argument, although important to the affected tribes, are very limited as they curtail State prerogatives. We do not of course

suggest that those who sell to Indians are, on that account, exempted from most State regulation and taxation. The Indian Commerce Clause, as we construe it, inhibits only burdens sought to be imposed directly on the Indian transaction, as is concededly the result here. Nor do we contend that every purchase by an individual Indian immunizes the seller from a transactional tax. We focus only on sales to the tribe itself, and only those which occur within reservation boundaries. And, finally, we invoke the Indian Commerce Clause as barring State regulation or taxation in respect of equipment to be used on the reservation in furtherance of the purposes for which it was originally set apart. There is, in this case, no arguable question of abusing a privilege, or of unduly extending a limited principle by resort to artificial devices. What is claimed is an immunity—running to the seller but given for the benefit of the tribe, on whom the economic consequences admittedly fall—in respect of Indian trade and intercourse in the most traditional sense. This much protection, we submit, the Indian Commerce Clause still affords today.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted.

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NOVEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305423 130